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EDITOR'S NOTE

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o. 85-246-CFY
tatus: GRANTED

ocketed:
ugust 13, 1985

Title: United States, Petitioner
v.
Dwight Dion, Sr.

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Dow, Michael H., Pechota, Terry L.

ntry	Date	Note	Proceedings and Orders
1	Jul 5 1985		Application for extension of time to file petition and order granting same until August 18, 1985 (Blackmun, July 9, 1985).
2	Aug 13 1985	G	Petition for writ of certiorari filed.
3	Sep 18 1985		DISTRIBUTED. October 11, 1985
4	Sep 20 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Sep 20 1985		Brief of respondent in opposition filed.
7	Oct 15 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Oct 15 1985		Petition GRANTED.
			**********
9	Nov 1 1985	G	Motion of respondent for appointment of counsel filed.
10	Nov 4 1985		DISTRIBUTED. Nov. 8, 1985. (Motion of respondent for appointment of counsel).
11	Nov 12 1985		Motion for appointment of counsel GRANTED and it is ordered that Terry L. Pechota, Esquire, of Rapid City, South Dakota, is appointed to serve as counsel for the respondent in this case.
12	Nov 26 1985		Brief amicus curiae of Environmental Defense Fund, et al. filed.
14	Nov 27 1985		Order extending time to file brief of petitioner on the merits until December 6, 1985.
15	Dec 6 1985		Brief amicus curiae of International Assn. of Fish And Wildlife Agencies filed.
16	Dec 6 1985		Joint appendix filed.
17	Dec 6 1985		Brief of petitioner United States filed.
18	Dec 6 1985		Lodging recieved from amicus.
20	Dec 27 1985		Order extending time to file brief of respondent on the merits until January 17, 1986.
21	Jan 17 1986		Brief amicus curiae of Assiniboine and Sioux Tribes, et al. filed.
22	Jan 13 1986		Brief amicus curiae of Seminole Tribe of Florida filed.
23	Jan 17 1986		Brief amicus curiae of National Congress of American Indians, et al. filed.
24	Jan 17 1986		Brief amicus curiae of Hopi Indian Tribe filed.
25	Jan 17 1986		Brief of respondent Dwight Dion, Sr. filed.
26	Feb 4 1986		SET FOR ARGUMENT, Tuesday, March 25, 1986. (3rd case)
27	Feb 5 1986		Record filed.
28	Feb 5 1986		Certified copy of original record and C.A. proceedings,

o. 85-246-CFY

ntry	Date	Note	Proceedings and Orders
			15 volumes, received.
29	Feb 11 1986		CIRCULATED.
30	Mar 11 1986	G	Motion of the Solicitor General to permit Jeffrey P. Minear, Esquire, to present oral argument pro hace vice filed.
31	Mar 18 1986	X	Reply brief of petitioner United States filed.
32	Mar 24 1986		Motion of the Solicitor General to permit Jeffrey P. Minear, Esquire, to present oral argument pro hace vice GRANTED.
33	Mar 25 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-246

No.

Supreme Court, U.S.
FILED
AUG 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

DWIGHT DION, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether Indian tribal hunting rights provide a defense to the taking prohibitions of the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, and the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

PARTIES TO THE PROCEEDING

Respondent was tried alone, but the cases of Asa Primeaux, Sr., Lyle Dion, and Terry Fool Bull were joined with his on appeal. Asa Primeaux, Sr. and Terry Fool Bull did not preserve on appeal the issue involved in this petition.* We have sought rehearing in the court of appeals of the reversal of Lyle Dion's conviction on other grounds; regardless of the outcome of that petition and the instant case, we will not seek to retry Lyle Dion on the only count on which he was convicted that raises the issue in this petition. Accordingly, pursuant to Rule 19.6 of the Rules of this Court, we are notifying the Clerk of this Court of our belief that neither Asa Primeaux, Sr., Terry Fool Bull, nor Lyle Dion has any interest in the outcome of this petition. See R. Stern & E. Gressman, *Supreme Court Practice* 441-442 (5th ed. 1978).

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* See note 5, *infra*.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DWIGHT DION, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The January 9, 1985, opinion of the court of appeals, sitting en banc (App., *infra*, 1a-23a), is reported at 752 F.2d 1261. The May 20, 1985, opinion of the court of appeals panel (App., *infra*, 24a-66a) is reported at 762 F.2d 674. The September 8, 1983, order of the district court dismissing Count 12 of the indictment (App., *infra*, 69a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 67a-68a) was entered on May 20, 1985. On July 9, 1985, Justice Blackmun granted an extension of time until August 18, 1985, within which to file a petition for a writ of certiorari.

STATUTES INVOLVED

1. The Bald Eagle Protection Act, 16 U.S.C. 668 (a), provides in relevant part:

> Whoever * * * shall * * * take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, * * * shall be fined not more than $5,000 or imprisoned not more than one year or both * * *.

Section 668a provides in relevant part:

> Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof * * * for the religious purposes of Indian tribes * * * he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: * * * *Provided* * * * That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior * * *.

2. The Endangered Species Act of 1973, 16 U.S.C. 1538(a), provides in pertinent part:

> (1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—
>
> * * * * *

> (B) take any such species within the United States or the territorial sea of the United States;
>
> * * * * *
>
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C)[.]

Section 1539 provides in pertinent part.

> (e) Alaska natives
>
> (1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species * * *, by—
>
> (A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or
>
> (B) any non-native permanent resident of an Alaskan native village;
>
> if such taking is primarily for subsistence purposes * * *.
>
> * * * * *
>
> (4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village.

STATEMENT

1. In February 1981, the United States Fish and Wildlife Service initiated an undercover investigation (Operation Eagle) into the illegal taking and selling of bald and golden eagles and other migratory birds in South Dakota.[1] Early in the investigation, the undercover agents were introduced to respondent, a "main actor[] in the protected bird and feather trade" (App., *infra*, 28a). Over the approximately two-year course of the investigation, the agents purchased from him the carcasses of seven bald eagles and one golden eagle, as well as numerous Indian crafts containing the feathers of various birds protected by the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* (App., *infra*, 28a-29a).

The eagles had been taken by respondent, an enrolled member of the Yankton Sioux tribe (App., *infra*, 5a), within the boundaries of the Yankton Sioux reservation.[2] That reservation is located in southeastern South Dakota, directly across the Missouri River from the Karl Mundt National Wildlife Refuge. This refuge, which was established for the express purpose of protecting bald eagles, is one of the largest wintering areas for the bald eagle in the lower 48 states (II Tr. 158-163). Between 200 and 300 eagles use the refuge each year, with a peak

[1] Operation Eagle resulted in charges against more than 40 individuals. Many of these are Indians who live on or near the Yankton Sioux Reservation (III Tr. 65-66).

[2] Respondent told the agents that he killed 15 to 20 eagles a year, that he had killed eagles for years, and that a number of people in the Indian community depended on him to get eagle feathers (III Tr. 22, 33).

population at any one time of approximately 120 eagles (*ibid.*).

2. In the district court, respondent was charged with one count of taking a golden eagle in violation of the Bald Eagle Protection Act (BEPA), 16 U.S.C. 668 *et seq.* (Count 12); two counts of taking bald eagles in violation of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* (Counts 8 and 10);[3] and ten counts of selling the whole carcasses or parts of eagles and other migratory birds in violation of the BEPA and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.*

In a pre-trial motion, respondent moved to dismiss all counts on the basis of *United States* v. *White*, 508 F.2d 453 (8th Cir. 1974), because all the violations occurred on the Yankton Sioux Reservation. In *White*, the Eighth Circuit held that the BEPA "taking" prohibitions did not apply to a Chippewa Indian exercising treaty hunting rights on his reservation, because Congress had not expressed a sufficiently clear intent to abrogate those rights when it enacted the statute. Respondent argued that the *White* rationale should be extended to include takings of wildlife protected by the ESA and sales of birds protected by the BEPA and MBTA.

The district court, construing *White* narrowly, dismissed only Count 12, which charged a taking in violation of the BEPA. It refused to dismiss Counts 8 and 10, which charged takings in violation of the ESA, concluding that Congress had intended to

[3] Since 1967, the bald eagle has been listed as endangered in all but five of the lower 48 states. 32 Fed. Reg. 4001. Since 1978, it has been listed as threatened in those five states (Washington, Oregon, Wisconsin, Minnesota and Michigan). 43 Fed. Reg. 6233 (1978). See 50 C.F.R. 17.11 (current list).

abrogate treaty hunting rights as to endangered species. It reasoned that the right to hunt bald eagles "would have no value if Bald Eagles became extinct" (App., *infra*, 71a). The district court also refused to dismiss the ten counts charging sales of eagles and other migratory birds. The court concluded that even if the BEPA and MBTA did not abrogate respondent's treaty right to hunt the protected birds on his reservation, those Acts could "properly prohibit the commercial sale" of those birds. App., *infra*, 71a.

A jury convicted respondent on the two remaining taking counts and on eight of the sales counts. Respondent appealed his convictions on these counts. The United States appealed the district court's dismissal of Count 12.

3. On appeal, respondent's case was consolidated with the appeals of three other Indians convicted in prosecutions arising out of Operation Eagle: respondent's son, Lyle Dion; Asa Primeaux, Sr.; and Primeaux's son-in-law, Terry Fool Bull.[4] Only respondent and his son asserted a treaty defense to their convictions at the appellate stage.[5]

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[4] Asa Primeaux, Sr., was convicted on eight counts of selling bald and golden eagles and other migratory birds, or parts thereof, in violation of the BEPA and the MBTA. Lyle Dion and Terry Fool Bull were each convicted on one count of taking a bald eagle in violation of the ESA and one count of selling it in violation of the MBTA.

[5] Terry Fool Bull is an enrolled member of the Rosebud Sioux Tribe, but the violations with which he was charged occurred on the Yankton Sioux Reservation. Asa Primeaux, Sr., an enrolled member of the Yankton Sioux Tribe, was convicted of selling protected birds, but not of taking any birds. Neither pursued the treaty defense on appeal. See App., *infra*, 4a n.4 (incorrectly implying that Primeaux was not a Yankton Sioux).

As the United States was seeking the overruling of *United States* v. *White*, *supra*, it requested an en banc hearing at the outset of the appeal. Although the appellate court initially denied that request, a three-judge panel, after oral argument, transferred the treaty issues to the en banc court for consideration.

The en banc court reaffirmed *White* and extended its application to criminal prosecutions under the Endangered Species Act (App., *infra*, 22a).[6] First, the court found that the Dions had a treaty right to hunt eagles[7] but not to sell them or other migratory birds. Because there was no treaty right to sell, the court reasoned that there was also no treaty right to take eagles for a commercial purpose. App., *infra*, 8a-9a. Relying upon *White*, the court reaffirmed that it would require an express reference to treaty rights either in the statute itself or in its legislative history before it would find a congressional abrogation of these rights. App., *infra*, 14a-15a. The court did not

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[6] Judges McMillian, Bright and Fagg dissented; they would have overruled *White* (App., *infra*, 23a).

[7] In the 1858 Treaty with the Yankton Tribe of Sioux, Apr. 19, 1858, 11 Stat. 743 *et seq.*, the Yanktons ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land. The 1858 Treaty made no express reservation of a hunting right on either ceded or retained lands, although an 1851 Treaty with the entire Sioux Nation, including the Yankton Sioux, recognized each tribe's territory and reserved to the tribes the "privilege of hunting, fishing, or passing over" each other's territory. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749, *reprinted at* C. Kappler, *Indian Affairs—Laws and Treaties* art. 5, at 595 (1904). See *Menominee Tribe* v. *United States*, 391 U.S. 404, 406 (1968) (hunting rights may be implied).

find such an express statement in either the BEPA or the ESA. App., *infra*, 19a-22a.[8]

The court also rejected the government's argument, based upon the *Puyallup* trilogy,[9] that generally applicable federal conservation statutes limit Indian hunting rights. In contrast to the *Puyallup* cases, which the court stated involved a "shared" treaty right—*i.e.*, the right to take fish in common with non-Indians—the court here found that the Yankton Sioux would not have understood the treaty "as permitting other sovereigns to regulate their exclusive on-reservation treaty hunting rights." App., *infra*, 19a.

The court therefore affirmed the district court's dismissal of Count 12 against respondent, reversed his convictions on Counts 8 and 10, and affirmed his convictions on the eight counts charging illegal sales. As respondent had no treaty right to take eagles or other protected birds for a commercial purpose, however, the court stated that the government was free to retry respondent if it could prove, under proper instructions, that his takings were commercially motivated. App., *infra*, 22a-23a.[10] For the same reasons,

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[8] Because the only charges under the MBTA involved sales, not takings, the court did not consider whether the MBTA abrogated treaty rights (App., *infra*, 10a-11a).

[9] *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe, Inc.* v. *Department of Game (Puyallup III)*, 433 U.S. 165 (1977).

[10] The court stated that the jury must determine whether respondent was a member of the Yankton Sioux Tribe; whether the takings occurred on the Yankton Sioux Reservation; and if the takings did occur on the reservation, whether or not the takings were for commercial purposes (App., *infra*, 22a-23a). The first two facts were essentially undisputed, as was the fact that respondent sold the eagles to the agents (II Tr. 223-226; III Tr. 35-46, 58-63, 183-186).

the en banc court reversed Lyle Dion's taking conviction and affirmed the district court's refusal to dismiss the count charging an illegal sale (*id.* at 23a).

The en banc court then remanded all four cases to the panel for determination of the remaining nontreaty defenses. The panel subsequently reversed Lyle Dion's and Terry Fool Bull's convictions outright, holding that they were entrapped as a matter of law. App., *infra*, 65a-66a. The panel rejected the nontreaty defenses raised by Dwight Dion and Asa Primeaux, Sr. The government has petitioned the court of appeals for rehearing and rehearing en banc on the entrapment issue. Consequently, its petition here relates only to Dwight Dion. See page II, *supra*.

REASONS FOR GRANTING THE PETITION

The decision below seriously undermines the congressional intent in enacting two important wildlife conservation measures, and threatens their effectiveness. It does so on the basis of an analysis that misinterprets this Court's relevant decisions, in direct conflict with a decision of the Ninth Circuit.

1. In *United States* v. *Fryberg*, 622 F.2d 1010, cert. denied, 449 U.S. 1004 (1980), the Ninth Circuit held that tribal hunting rights do not preclude a conviction for violation of the taking prohibition of the BEPA. In our opposition to the petition for certiorari in that case, we recognized the conflict with *United States* v. *White*, *supra*, but suggested that in light of this Court's decisions subsequent to *White*, the Eighth Circuit might well retreat from its in-

terpretation of the BEPA, and thus resolve the conflict. Justices Blackmun and White would nevertheless have granted certiorari in *Fryberg* (449 U.S. 1004 (1980)). The prediction in our *Fryberg* opposition has not proved accurate; in this case, the Eighth Circuit reaffirmed and expanded the ruling of *White*. The conflict between the circuits now merits resolution by this Court.

2. The court below misinterpreted this Court's decisions in concluding that Indian treaty rights permit them to hunt wildlife protected by bona fide non-discriminatory conservation statutes.

a. This Court has emphasized that Indian treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). The parties to nineteenth century Indian treaties simply did not consider whether the right to hunt or fish included the right to extirpate a species.[11] In-

[11] In asserting that the record in this case contains no evidence that Indian hunting threatens the eagle with extinction (App., *infra*, 18a n.14), the court below seriously misapprehended the statutory schemes of both the BEPA and the ESA. In enacting the BEPA, Congress itself made the determination that bald (54 Stat. 250-251) and golden (76 Stat. 1246) eagles were in fact so threatened with extinction that *all* takings must be prohibited, subject only to certain very narrow exceptions, available only when the Secretary makes a specific finding that the taking is compatible with the continued existence of the species (16 U.S.C. 668a). In the ESA, the finding that a particular species is in danger of extinction, or likely to become endangered in the near future (16 U.S.C. 1532(6) and (20)) is a pre-condition to its listing, and the application to it of the statute's protections. 16 U.S.C. 1533, 1538. See also 50 C.F.R. 17.31(a) (prohibitions as to endangered species generally apply to threatened species).

stead, as this Court noted in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 668-669 (1979), the parties believed that our wildlife resources were "inexhaustible" and did not contemplate any need for their conservation. Given this historical setting, there is no basis for supposing that, had the present threat been contemplated, the Indians would have insisted on, and the United States would have conceded, an untrammeled right to hunt eagles regardless of the fate of the species. See *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916). Indeed, because of the special religious and cultural significance of the eagle to the Indians, they have a particular interest in preserving that species for future generations. Cf. App., *infra*, 8a-9a.

b. This Court's *Puyallup* decisions confirm that Indian treaty rights do not extend to hunting a species to extinction. Although it is clear that a state has no power to abrogate Indian treaties, and consequently no power to restrict valid treaty rights (see, *e.g.*, *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337-338, 342 (1983); *Puyallup III*, 433 U.S. 165, 176 n.15) (1977)), this Court in *Puyallup II* emphasized the inherent limitation on these rights (414 U.S. 44, 49 (1973)):

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular

cies). There is accordingly no need to establish anew the threat of extinction in individual prosecutions under these Acts.

> stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

The Court has indicated, moreover, that *on*-reservation fishing and hunting rights derived from a treaty with the United States are not absolute. See *Puyallup III*, 433 U.S. at 176 ("it would be decidedly unwise, if Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights"); see also *Fishing Vessel*, 443 U.S. at 684-687. It is abundantly clear that non-Indians, as well as Indians, have an interest in avoiding the eradication of eagles and other endangered species. The rationale of the *Puyallup* cases precludes the conclusion of the court below that Indian treaty rights are broad enough to provide a defense to *federal* conservation statutes.[12]

3. Even assuming that the 1858 Yankton Sioux Treaty could be interpreted as granting respondent an unfettered right to take eagles and other endangered species, it is clear that this treaty right was at the least suspended by the BEPA and the ESA. While fully accepting the rule that an intent to limit Indian treaty rights must be clear from the face of the federal statute or its legislative history, we submit that standard is satisfied here.

a. The House report to the 1962 amendment to the BEPA specifically noted that the decline in the

[12] This case does not, of course, involve any question concerning the scope of a state's power to enforce a state statute designed to protect a species from extinction against hunting by Indians on their reservation. We do not contend that a state could so enforce such a statute.

golden eagle population was due in part to the killing of these eagles by Indians:

> Certain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers, as well as to provide souvenirs for tourists in the Indian country.

H.R. Rep. 1450, 87th Cong., 2d Sess. 2 (1962).[13] The Department of the Interior advocated adoption of the 1962 amendment to the BEPA, which included golden eagles within the purview of the Act, but only if the Act was also amended to "permit the Secretary of the Interior, by regulation to allow the use of eagles for religious purposes by Indian tribes." Letter from Frank P. Briggs to Honorable Warren G. Magnuson (Feb. 5, 1962), *reprinted in* S. Rep. 1986, 87th Cong., 2d Sess. 5, 6 (1962), and 108 Cong. Rec. 22272 (1962). Congress acceded to this request; it amended the BEPA to authorize the Secretary to allow by regulation the taking, possession, and transportation of eagles "for the religious purposes of Indian tribes," but only if he finds such taking compatible with the preservation of the species. 16 U.S.C. (1964 ed.) 668a. It is thus clear that Congress thought that the Bald Eagle Protection Act, as adopted in 1940 and as amended in 1962, fully applied to Indians, subject only to the special permit

[13] See *1962—Miscellaneous Fish and Wildlife Legislation: Hearings Before the Subcomm. on Fishery and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 15 (1962) (Fish and Wildlife Service testimony identifying "rather substantial market for eagle feathers mostly for Indian rituals [and] the tourist trade" as providing stimulus for killing). Accord, *id.* at 29, 39, 47.

exemption for Indian religious ceremonies.[14] See also *Andrus* v. *Allard*, 444 U.S. 51, 56-57 (1979), contrasting the "sweepingly framed" prohibitions of the BEPA with its "specifically limited" exemptions.

b. The Endangered Species Act of 1973 and its legislative history equally demonstrate that Congress intended it to apply to Indians. The ESA's prohibitions apply to "any person subject to the jurisdiction of the United States." 16 U.S.C. 1538(a)(1). Certain exemptions are set out in 16 U.S.C. 1539, including a limited provision allowing any "Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" or any "non-native permanent resident of an Alaskan native village" to take an endangered species, but only if the taking is "primarily for subsistence purposes." 16 U.S.C. 1539(e)(1), (A) and (B).[15]

An earlier version of the bill contained a much broader exemption, which specifically applied to Indians exercising treaty rights. S. 3199, 92d Cong., 2d Sess. (1972).[16] This bill failed to pass, and a new

[14] Nothing in the legislative history supports the ingenious suggestion of the court below that the exception was designed only to permit *non*-Indians to take eagles for Indian religious purposes (App., *infra*, 21a). Certainly, if Congress intended such a strained reading of the Act, it would have given some indication of that intent.

[15] Even so, this subsistence taking may be restricted by regulation if the taking "materially and negatively affects" an endangered or threatened species. 16 U.S.C. 1539(e)(4).

[16] This exemption provided (S. 3199, *supra*, § 5(a)(2)):

> The prohibitions contained in this section shall not apply to American Indians, Aleuts, or Eskimos who take endangered species for their own consumption or ritual purposes in accordance with a treaty or pursuant to Executive Order or federal statute.

bill was introduced the following year. The limited exemption for Alaska Natives contained in the present Act was inserted into this new bill. *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 69-71, 134-136 (1973). On the Senate floor, the narrowness of the exemption was stressed. 119 Cong. Rec. 25677 (1973).

In sum, when considering each Act, Congress addressed the extent to which it should apply to Indians, and determined that Indians should be granted only very narrowly circumscribed exemptions from the statutory provisions. It is not the function of the courts to expand those exemptions. Where, as here, the intent of Congress is clear, a court is not free to ignore that intent, even where Indian treaty rights are involved. See *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, slip op. 12, 21. The court below thus exceeded the proper bounds of judicial review in requiring an express reference to treaty rights in the statute or its legislative history.

4. The decision below, if unreversed, threatens to have serious practical effects not only on the country's bald eagle population, but on other endangered species as well.[17] Even if other circuits choose to fol-

[17] The decision jeopardizes federal efforts to protect not only the eagle, but also such other wildlife on the list of endangered and threatened species as the grizzly bear, the gray wolf, the peregrine falcon, and the whooping crane. See 50 C.F.R. 17.11. The risk is real. For example, a Florida state court recently dismissed a state prosecution against the Chairman of the Seminole Indian tribe for killing one of the some 30 remaining Florida panthers, on the theory that the state conservation law does not extend to killings by Indians

low *Fryberg*, the impact of the instant decision within the Eighth Circuit will substantially affect national conservation efforts. The Eighth Circuit contains 28 Indian reservations, with a population of approximately 91,000 Indians. Bureau of Indian Affairs, U.S. Dep't of Interior, *Local Estimates of Resident Indian Population and Labor Force Status: January 1983*, Table 3 (Indians Living on or Adjacent to Reservations). Twelve of the National Wildlife Refuges within this circuit are found within ten miles of a reservation. Several, including the Karl Mundt Refuge, border on reservations or are separated from them only by rivers in which the eagles and other wildlife live or seek fish or waterfowl. The Eighth Circuit thus contains substantial numbers of the total national population of a variety of federally protected endangered and threatened species within easy access of Indians who may wish to hunt them.

The instant case threatens to impede substantially the successful prosecution of such hunters, thus increasing their incentive to take the wildlife and hindering efforts to protect the various populations.[18]

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on their reservation. *State* v. *Billie*, No. 83-202 (Fla. Cir. Ct. June 28, 1985). The rationale of the instant decision would preclude a federal prosecution as well, leaving the reservation Indians totally free to destroy any of the few remaining panthers if they find them on their reservation. The Director of the Fish and Wildlife Service has informed us that approximately 15% of the panthers' known habitat is on Indian lands.

[18] The potential impact of Indian hunting on the eagle population could be serious. Respondent estimated he himself killed 20 eagles a year, and in fact he sold 7 bald eagles to the agents in about 2 years. Interior estimates the total bald eagle wintering population in the Eighth Circuit to be 2,452 eagles. National Wildlife Federation, *1984 Mid Winter Bald Eagle Survey*. The peak eagle population at the Karl Mundt refuge, one of the largest wintering areas for the eagle, is only 120 birds (II Tr. 158-163).

The Eighth Circuit would require the government to prove either that the protected wildlife was not taken on the reservation—which might be difficult or impossible, particularly where a wildlife refuge borders the reservation—or that it was taken for a commercial purpose.[19] It is not even clear that a subsequent sale of the wildlife would suffice to establish such commercial intent in the taking. Here, despite undisputed evidence that respondent sold the birds to to the agents, the court refused to find a commercial taking as a matter of law, and instead remanded the taking counts for retrial "under proper instructions" (App., *infra*, 22a-23a).

In sum, it is clear that the decision below increases the government's burden in prosecutions to enforce the BEPA and the ESA, and it may well be that like problems will attend the enforcement of other federal conservation statutes under the court's overly restrictive standards of statutory interpretation where Indian treaty rights are involved. This Court should remove these clouds on the federal ability to enforce these important laws.

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[19] The court below concluded that commercial takings of eagles and other migratory birds were not protected because there was no evidence in this record that the Yankton Sioux had historically engaged in commercial trade in such wildlife (App., *infra*, 9a n.10). Thus, on a different record, the court might conclude that there was a treaty right to take birds or other wildlife for commercial purposes (App., *infra*, 9a n.11). See *Puyallup I*, 391 U.S. at 398; *Puyallup II*, 414 U.S. at 48; *Fishing Vessel*, 443 U.S. at 686-687.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2353

UNITED STATES OF AMERICA, APPELLANT

v.

DWIGHT DION, SR., APPELLEE

No. 83-2521

UNITED STATES OF AMERICA, APPELLEE

v.

ASA PRIMEAUX, SR., APPELLANT

No. 83-2538

UNITED STATES OF AMERICA, APPELLEE

v.

DWIGHT DION, SR., APPELLANT

No. 83-2543

UNITED STATES OF AMERICA, APPELLEE

v.

LYLE DION, APPELLANT

No. 83-2544

UNITED STATES OF AMERICA, APPELLEE

v.

TERRY FOOL BULL, APPELLANT

Appeals from the United States District Court
for the District of South Dakota

Submitted: September 13, 1984

Filed: January 9, 1985

Before HEANEY, BRIGHT, ROSS, MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, en banc.*

ROSS, Circuit Judge.

From February 25, 1981, to June 15, 1983, agents for the United States Fish and Wildlife Service conducted an undercover operation ("Operation Eagle") in South Dakota to investigate the killing and selling of bald and golden eagles and other protected birds. Posing as traders and collectors, the agents purchased the carcasses and parts of such birds from a number of tribal Indians, including the defendants in this appeal. The defendants were subsequently charged, in separate indictments, with taking and selling bald and golden eagles and other protected birds in violation of the Eagle Protection Act, 16 U.S.C. §§ 668-668d (1982), the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1982), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982).

Relying upon this court's decision in *United States v. White*, 508 F.2d 453 (8th Cir. 1974), the district

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* Chief Judge Donald P. Lay did not participate in this case.

court[1] dismissed count 12 of the indictment against Dwight Dion, Sr., which charged him with taking[2] an eagle in violation of the Eagle Protection Act, since the taking occurred on the Yankton Sioux Reservation. The court refused, however, to grant motions to dismiss the remaining charges against Dwight Dion, Sr., or the charges against Lyle Dion.

A jury then convicted defendant Dwight Dion, Sr., of violating 16 U.S.C. § 668(a) (1982) of the Eagle Protection Act by offering for sale or selling parts of bald eagles (in the form of fans) (counts 3 and 5), violating 16 U.S.C. §§ 703 and 707 (1982) of the Migratory Bird Treaty Act by offering for sale or selling feathers of scissor-tailed flycatchers (in the form of fans) (counts 9, 11, and 14), selling seven bald eagle carcasses, and one golden eagle carcass (count 13), and violating 16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) (1982) of the Endangered Species Act by taking[3] four bald eagles counts 8 and 10). Defendant Lyle Dion was convicted of violating 16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) (1982) of the Endangered Species Act by taking a bald eagle (count 1) and violating 16 U.S.C. §§ 703 and 707 (1982) of the Migratory Bird Treaty Act by offering for sale or selling a bald eagle (count 2).

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[1] The Honorable John B. Jones, United States District Judge for the Southern District of South Dakota.

[2] "Taking" is defined in the Eagle Protection Act as follows: " 'take' includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or molest or disturb; * * *." 16 U.S.C. § 668c (1982).

[3] "Taking" is defined in the Endangered Species Act as follows: "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1982).

The government appeals the dismissal of count 12 of the indictment against Dwight Dion, Sr., pursuant to the provisions of 18 U.S.C. § 3731 (1982), arguing that *White* should be overruled. Two of the defendants on this appeal,[4] Dwight Dion, Sr., and Lyle Dion (father and son), argue that *White* should be extended to shield them from criminal liability for all the charges against them.[5]

We shall continue to adhere to the narrow holding of *White* and we extend its reasoning to the Endangered Species Act. At the same time, however, we limit its reach, under the facts of this case, to non-commercial transactions.

1. *White* Holding

In *White*, this court concluded that:

> [T]he Red Lake Band of Chippewa Indians enjoy a right to hunt on the Red Lake Reservation and * * * this right has been implicitly recognized in treaties negotiated by that band and the United States. To affect those rights, then, by 16 U.S.C. § 668 [the Eagle Protection Act], it was incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and Red Lake Chippewa Indians on their native reservation. We do not believe it has done so.

[4] The other defendants on this appeal, Terry Fool Bull and Asa Primeaux, Sr., do not argue that *White* shields them from criminal liability. *White* is not applicable to their case since their allegedly criminal acts were not committed on land reserved to an Indian tribe of which they were members.

[5] The *en banc* consideration given to this appeal extends only to the viability and applicability of *White*. The other issues raised by the defendants will be considered by a panel of this court.

United States v. White, *supra*, 508 F.2d at 457-58. Accordingly, we held that an enrolled member of the Red Lake Band of Chippewa Indians who shot at a bald eagle within the confines of the Red Lake Reservation could not be convicted of taking an eagle in violation of the Eagle Protection Act.

In applying the treaty defense established in *White*, it must first be determined whether the defendants were acting within the scope of a treaty right. If so, it must then be determined whether the treaty right has been abrogated.

II. Treaty Rights

In 1858, the Yankton Sioux and the United States negotiated a treaty[6] in which the Yankton Sioux ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land.[7] This land was reserved for their occupation and is now known as the Yankton Sioux Reservation.

Defendants Dwight Dion, Sr., and Lyle Dion are enrolled members of the Yankton Sioux Tribe. They assert that all of the criminal acts alleged in their indictments were committed on the Yankton Sioux

[6] Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743.

[7] The Supreme Court of South Dakota has determined that an act of Congress in 1894 diminished the size of the original reservation. *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1964). *See Weddell v. Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980).

Reservation and that, pursuant to the decision in *White*, they possessed a treaty right to hunt and sell the birds free from threat of criminal liability.

A. Principles of Construction

Distinctive principles of construction have been developed for the purpose of interpreting the scope of Indian treaties, partially due to the United States' "superior negotiating skills and superior knowledge of the language in which * * * [treaties were] recorded, * * *." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 675-76 (1979). *See* F. Cohen, *Handbook of Federal Indian Law* 222 (1982 ed.) (hereinafter cited as Cohen). These principles have been summarized as follows: "In construing Indian treaties, the courts have required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them." Cohen, *supra*, at 222 (citations omitted). The Ninth Circuit developed the latter principle in *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976) as follows:

> The treaty is to be construed as the Indians *would have understood it, Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938), as disclosed by the practices and customs of the Indians at the time the treaty was negotiated, *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974); *Moore v. United States*, 157 F.2d 760, 762-63 (9th Cir. 1946), and by the history of the treaty, the negotiations that preceded it, and the

> practical construction given the treaty by the parties, *Skokomish Indian Tribe v. France*, 320 F.2d 205, 207-08 (9th Cir. 1963), *quoting Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). In sum, the treaty is to be interpreted to attain the reasonable expectations of the Indians. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Calif.L.Rev. 601, 617-18 (1975).

Id. at 487.

B. Right to Hunt

Although the Yankton Sioux treaty is silent as to on-reservation hunting rights, the following statement in *White* makes it clear that such rights exist:

> "An examination of the various treaties between the United States and the Chippewa Indians discloses that while the right in the Indians to hunt and fish on ceded lands was reserved in some of the earlier treaties [8] * * *, no reservation of the right to hunt and fish was made with respect to the unceded lands of the Red Lake Reservation. But *such a reservation was not necessary to preserve the right on the lands reserved or retained in Indian ownership.* The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed' re-

[8] Likewise, an earlier treaty to which the Yankton Sioux Tribe was a party reserved hunting and fishing rights in the tribes of the Sioux Nation. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749.

mained in them unless granted away. *United States v. Winans*, 198 U.S. 371, 381 (1905).

United States v. White, *supra*, 508 F.2d at 457 (emphasis added) (*quoting* F. Cohen, *Handbook of Federal Indian Law* 496-97 (2d ed. 1958)). *White* clearly establishes that the Yankton Sioux Indians would have understood the treaty as reserving in them the right to hunt eagles on their reservation, at least for traditional purposes.[9]

C. Right to Sell

In *United States v. Top Sky*, *supra*, 547 F.2d 486, the Ninth Circuit upheld an Indian's conviction for selling eagle feathers on the ground that his treaty rights as a Chippewa-Cree Indian did not extend to the commercial sale of eagles. No expectation of a treaty right to sell eagles existed, since there was no historical evidence of a practice of selling eagle parts and since such a practice was deplored as a matter of tribal custom and religion. *Id.* at 487-88.

The defendants in this appeal presented no historical evidence of a Yankton Sioux practice of selling parts or carcasses of eagles or scissor-tailed flycatchers. In fact, like *Top Sky*, the record discloses that the sale of eagle parts is deplored as a matter of

[9] The record reveals that historically, Sioux Indians captured eagles in a religious ceremony for religious purposes. The Indians captured eagles by digging a pit and placing bait on top of a brush cover set over the pit. An Indian would sit in the pit, grab the eagle when it went for the bait, and either strangle it, frighten it to death, or let it go. Although treaties are interpreted primarily by reference to facts existing at the time of signing, the Yankton Sioux would not be limited to the above method of capturing eagles in exercising their treaty-reserved right to hunt eagles. *See* Cohen, *supra*, at 447.

tribal custom and religion. We find that the Yankton Sioux would not have understood the treaty as reserving in them a right to sell eagles or scissor-tailed flycatchers. Accordingly, the defendants do not have a treaty right to sell such birds.[10]

D. Right to Engage in Commercial Taking

Since the Yankton Sioux lacked any understanding that they had a treaty right to sell eagles commercially, it follows that they could not have had a reasonable expectation of a right to take eagles for this purpose. We find that the Yankton Sioux would not have understood the treaty as reserving in them a right to take eagles for the purpose of a commercial transaction.[11]

[10] The defendants argue that the right to hunt *must* include the right to sell or otherwise dispose of the catch. The court in *Top Sky* rejected a similar argument premised upon the personal property rights of a hunter in captured wild animals. *United States v. Top Sky*, 547 F.2d 486, 488 n.2 (9th Cir. 1976). We agree with the reasoning in *Top Sky*.

[11] Supreme Court cases dealing with treaty rights of Puyallup and other Northwest Indians to take fish for commercial purposes are distinguishable. In those cases, historical evidence established the existence of commercial fishing prior to and at the time of the treaties. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665 n.7 (1979); *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977) (*Puyallup III*); *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (*Puyallup II*); and *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (1968) (*Puyallup I*). This distinction is supported by the following interpretation of those cases:

> *Where Indians engaged in commercial fishing prior to and at the time of their treaties*, as was the case in the

The trial court failed to make a finding, upon the motions to dismiss filed by Dwight and Lyle Dion, that the takings were committed for such a purpose. Nor did the court instruct the jury to make such a finding. Instead, the district court refused to dismiss counts 8 and 10 of the indictment against Dwight Dion, Sr., and count 1 of the indictment against Lyle Dion solely on the basis that the Endangered Species Act abrogated the defendants' treaty hunting rights.

Accordingly, it must next be determined whether Congress has, in fact, abrogated or modified the defendants' treaty right to hunt in the Endangered Species Act. We must make a similar determination regarding the Eagle Protection Act, since the district court concluded that Dwight Dion, Sr., had established a treaty defense to count 12 of the indictment against him. We need not, however, determine whether Con gress has abrogated or modified Indian treaty rights to hunt in the Migratory Bird Treaty Act. The defendants were charged only with selling or offering to sell eagles and scissor-tailed flycatchers in violation of the Migratory Bird Treaty Act. No unlawful taking in violation of this Act was charged. Since we

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> Northwest and the Great Lakes areas, *the treaties will be read to entitle them to fish commercially today.*
>
> * * * *
>
> More recent decisions have affirmed that *Indians are entitled to fish commercially* in the exercise of both their on- and off-reservation treaty fishing rights, *where commercial fishing was traditionally practiced by the Indians.*

Cohen, *supra*, 446-47 and 465 (emphasis added) (*citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra; Puyallup (II), supra; Puyallup (I), supra*). *See also United States v. Top Sky, supra*, 547 F.2d at 488 n.2.

have found that the Dions lacked a treaty right to sell eagles or scissor-tailed flycatchers, the district court's refusal to grant the defendants' motions to dismiss based on their treaty defense was proper as to the Migratory Bird Treaty Act counts.

III. Statutory Abrogation of Treaty Rights

It is undisputed that Congress can abrogate treaty rights. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). The test for determining whether Congress has effectively abrogated treaty rights, however, has been disputed. *See* Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Calif.L. Rev. 601, 623-45 (1975) (judicial tests include: 1) abrogation only upon a "clear showing" of legislative intent, 2) abrogation "not lightly imputed," 3) abrogation only after "liberal construction" of the statute in favor of Indian treaty rights, 4) abrogation only upon express legislative reference to Indian treaty rights, and 5) several miscellaneous tests).

A. *White* Test

In *White*, we determined that statutory abrogation of treaty rights can only be accomplished by an express reference to treaty rights in the statute *or in the statute's legislative history.* We relied primarily upon *Menominee Tribe v. United States*, 391 U.S. 404 (1968), wherein the Supreme Court held that a statute terminating the federal trust relationship with the Menominee Tribe did not abrogate or modify treaty rights to hunt and fish. The Court "decline[d] to construe the Termination Act as a backhanded way of abrogating" the treaty rights, since an intention to abrogate the treaty rights would not be "lightly imputed to the Congress." *Id.* at 412-13. The Court

emphasized that the Termination Act contained no "explicit statement" abrogating hunting and fishing rights. *Id.* at 413.

This emphasis on express language was reaffirmed by the Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra*, 443 U.S. 658. The Court stated: "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights, * * *." *Id.* at 690 (*citing Menominee Tribe v. United States*, *supra*).

We also relied upon the fact that, in the final analysis, the issue was whether the Indian defendant would be subject to *criminal* sanctions. We stated:

> It must be remembered that 16 U.S.C. § 668(a) is a penal statute, that Jackie White was charged with its violation and by his trial was exposed to possible fine and loss of liberty. The specificity which we require of our criminal statutes is wholly lacking here as applied to an Indian on an Indian reservation.

United States v. White, *supra*, 508 F.2d at 459. *See also United States v. Bass*, 404 U.S. 336, 347-48 (1971) ("Congress * * * [must speak] in language that is clear and definite" before a criminal sanction is imposed) (*quoting United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

B. Viability of *White* Test

The government argues that the express reference test established in *White* should be overruled. It argues that: 1) surrounding circumstances and legislative history should be considered, and 2) where necessary in the interest of conservation, a federal

statute may regulate treaty hunting and fishing rights, without expressly abrogating such rights, as long as the statute applies in a nondiscriminatory manner to both treaty and nontreaty persons.

1. Surrounding Circumstances and Legislative History

The government relies on *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980) to support its contention that we should look to surrounding circumstances and legislative history for evidence of congressional intent to abrogate. In *Fryberg*, the court upheld a treaty-Indian defendant's conviction for taking a bald eagle in violation of the Eagle Protection Act. The court agreed with *White* that "neither the Act's statutory language nor its legislative history *expressly* state that Indian treaty rights were to be abrogated." *Id.* at 1013. However, the court found that *White's* express reference requirement was too rigid, stating:

> Congressional intent may be "clear from surrounding circumstances and legislative history", despite the absence of a Congressional expression on the "face of the Act" to abrogate or modify treaty rights. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1976). "In all cases, the 'face of the Act', the 'surrounding circumstances', and the 'legislative history', are to be examined with an eye towards determining what Congressional intent was." [Citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)]. *Id.* 430 U.S. at 587.

Id.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), a civil case, the Court held that certain congressional acts were effective to diminish the bound-

aries of the Rosebud Sioux Reservation. The Court noted that express language in an act is not the only method of terminating or diminishing a treaty reservation. *Id.* at 588 n.4. But, even in *Kneip*, the Court found that "cession language which * * * [had been] * * * found to be 'precisely suited' to disestablishment" was used by Congress in the "crucial" diminishment Act. *Id.* (*quoting DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)).

We shall continue to follow the express reference test established in *White* to cases involving criminal violations of the Eagle Protection Act and shall apply the same test to cases involving *criminal* violations of the Endangered Species Act. By "express reference" we refer to an express reference in *either* the Act itself *or* in the legislative history to the Act. Our decision is compelled by two factors. First, the express reference test is more desirable than the "surrounding circumstances and legislative history" test, as it leads to greater clarity and more consistent results.[12] Sec-

[12] Felix Cohen's treatise notes:

> A convincing argument has been made that the courts should explicitly adopt [the express language] standard, thereby promoting clarity and maximizing the protections afforded by Indian treaties. Wilkinson & Volkman, *supra* note 43, at 645-59.
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> * * * *
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> These cases [*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975)], however, illustrate the uncertainty of * * * [the surrounding circumstances and legislative history] rule, since the result in any particular case will turn on the weight a reviewing court puts on different indicia of intent in the relevant legislative history. *Compare Rosebud Sioux Tribe v. Kneip with Mattz v. Arnett*, 412 U.S. 481 (1973). *See* Wilkinson & Volkman, *supra* note 43, at 634-45.
>
> Cohen, *supra*, at 223, nn.56 & 57.
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> The uncertainty of the surrounding circumstances and legislative history test is also illustrated by its application in the dissent in *White* and in the *Fryberg* decision. The dissent in *White* found sufficient indicia of congressional intent to abrogate treaty hunting rights from "the broad wording and the pervasive [conservation] purpose" of the Eagle Protection Act, which Act would, in the dissent's opinion, "achieve its purpose only if it applies to everyone." *United States v. White*, 508 F.2d 453, 459, 461 (8th Cir. 1974) (Lay, J., dissenting). The court in *Fryberg* also relied on "the broad purpose of the Act" to support its finding "that Congress intended to modify Indian treaty rights to prohibit the taking of bald eagles, * * *." *United States v. Fryberg*, 622 F.2d 1010, 1016 (9th Cir. 1980).
>
> Use of the "broad wording and pervasive purpose" of an act as an indicator of congressional intent is manifestly vague and unreliable. Yet, the surrounding circumstances and legislative history test permits the use of such an unreliable indicator.

ond, as we stated in *White*, the clarity provided by the express reference test is critical where criminal sanctions may be imposed.[13] We apply the express reference test to both of the statutes involved in this case for the simple reason that the factors compelling our adherence to the test are applicable to each of the statutes.

[13] This factor clearly distinguishes the dicta in *Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 588 n.4 to the effect that express language of abrogation may not be neecssary. In *Kneip*, no criminal sanctions were threatened by the statutes which diminished the size of the reservation. We note also that the dicta in *Kneip* rejected the absolute requirement of express language *in the act*. The express reference test established in *White* and adhered to today looks for an express reference of abrogation in *either* the act *or* its legislative history.

2. Conservation Regulations

The government relies on two lines of Supreme Court cases dealing with state regulation of Indian fishing rights to support its contention that, where necessary in the interest of conservation, the federal government may regulate Indian treaty hunting and fishing rights, as long as the statute applies in a nondiscriminatory manner to both treaty and nontreaty persons. *See United States v. Fryberg, supra*, 622 F.2d at 1015.

First, the government cites *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). In *Kennedy*, a state conservation law prohibiting the taking of fish without a permit was held to apply to Indians on *nonreservation land* despite a treaty granting the Indians a right to fish on the land. The Court stated:

> It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But *the existence of the sovereignty of the State was well understood*, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. *We do not think that it is a proper construction of the*

> *reservation in the conveyance to regard it as an attempt* either to reserve sovereign prerogative or *so to* [*sic*] *divide the inherent power of preservation as to make its competent exercise impossible.* Rather are we [sic] of the opinion that *the clause is fully satisfied by considering it a reservation of a privilege* of fishing and hunting upon the granted lands *in common with the grantees*, and others to whom the privilege might be extended, *but subject nevertheless to that necessary power of appropriate regulation*, as to all those privileged, which inhered in the sovereignty *of the State over the lands where the privilege was exercised.*

Id. at 563-64 (emphasis added).

Second, the government cites a series of cases dealing with state regulation of fishing rights in connection with an Indian treaty right to take fish "*in common*" with other citizens. First, in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (*Puyallup I*), the Court stated:

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, * * *. But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Id. at 398. In *Antoine v. Washington*, 420 U.S. 194 (1975), the Court held that "[t]he 'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, * * * *and* that its

application to the Indians is necessary in the interest of conservation." *Id.* at 207 (citations omitted).

In *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*), the Court stated:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. *Rights can be controlled by the need to conserve a species*; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and *the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.*[14]

Id. at 49 (emphasis added). Finally, in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977) (*Puyallup III*) and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra*, 443 U.S. 658, the Court

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[14] The government relies on this language, which is dicta, as support for its argument that Indian treaty rights do not include the right to hunt a species to extinction. We do not find this argument controlling in this case. First, the dicta was expressed in the context of an "in common", shared treaty right. On-reservation treaty rights such as those involved in this case are exclusive rights. Cohen, *supra*, at 449. Second, and more importantly, the government has not established or even claimed that the eagle will become extinct if Indians are permitted to take eagles within the scope of their treaty rights. This court is not confronted with the problem of the imminent extinction of a species. Congress may still act if it chooses to do so.

determined that the tribe's *on-reservation* fishing take must be considered in allocating the fishing resource between Indians and non-Indians.

We read these cases as establishing only that "*in common*" treaty rights are subject to conservation regulation. These cases do not provide an alternate method of abrogating treaty rights. Rather, the cases merely interpret the scope of "in common" treaty rights.

Indians understood that "in common" treaty rights could be regulated by state governments where necessary to preserve the shared right. *See New York ex rel. Kennedy v. Becker*, *supra*, 241 U.S. at 563-64. The treaty rights of the Yankton Sioux to hunt, however, are exclusive rights on the reservation. *See* Cohen, *supra*, at 449. The Yankton Sioux would not have understood the treaty as permitting other sovereigns to regulate their exclusive on-reservation treaty hunting rights. Accordingly, the exclusive on-reservation treaty hunting rights of the Yankton Sioux are not subject to conservation regulations unless statutory abrogation of those rights has been effectuated.

In conclusion, we reject the government's contentions that we should adopt the surrounding circumstances and legislative history test to the acts in issue, or that we should permit Congress to regulate exclusive, on-reservation treaty hunting rights without abrogating such rights. We shall adhere to the express reference test set forth in *White*.

C. Application of *White* Test

In *Fryberg*, the Ninth Circuit agreed with our determination in *White* that neither the statutory language nor the legislative history of the Eagle Protec-

tion Act expressly stated that Indian treaty rights were to be abrogated or modified. *United States v. Fryberg, supra*, 622 F.2d at 1013. No changes in the Eagle Protection Act have been made to alter our conclusion in *White* that Congress has failed to effectively abrogate or modify Indian treaty hunting rights.

Congress has also failed to effectively abrogate treaty hunting rights in the Endangered Species Act. We cannot find an express reference to Indian treaty hunting rights showing congressional intent to abrogate or modify such rights in either the statutory language or legislative history of this Act. Nor has the government directed our attention to any such reference.

The government argues that an express congressional intent to abrogate Indian treaty hunting rights was exhibited by Congress' rejection of a bill [15] which would have specifically exempted American Indians from the purview of the Endangered Species Act. We reject such a "backhanded" way of abrogating treaty hunting rights of Indians, especially in criminal cases. Failure to pass a bill creating a specific exemption for American Indians does not show that Congress expressly intended that the Act would abrogate Indian treaty hunting rights. If Congress wishes to do so it should speak accordingly.

Nevertheless, we note that even if we ignore the express reference test and, instead, look for congressional intent to abrogate or modify treaty rights in less reliable sources, we reach the same conclusion. In reference to both acts, the fact that the acts are

[15] S. 3199, 92nd Cong., 2d Sess. § 5(a) (1972). Instead, Congress limited the express exemption to Alaskan Indians. 16 U.S.C. § 1539(e)(1) (1982).

broadly worded conservation measures [16] is inconclusive as to intent to abrogate Indian treaty rights. The plaudible purpose behind conservation statutes gives rise to strong emotions, especially where bald eagles are concerned, but does not necessarily reveal a congressional intent to eliminate rights protected by federal treaties.

In reference to the Eagle Protection Act in particular, the only possible indicator of intent to abrogate is a 1962 amendment which established the authority of the Secretary of the Interior to permit the taking of eagles "for the religious purposes of Indian tribes." 16 U.S.C. § 668a (1982). It has previously been suggested that there was no reason for such an exception unless Congress thought Indians were subject to the Eagle Protection Act. *United States v. White, supra*, 508 F.2d at 460 n.3 (Lay, J., dissenting). However, as the majority in *White* revealed, the religious purposes exception "is not limited to the taking of eagles by Indians or to the taking of eagles on Indian reservations." *Id.* at 458. In other words, it could have been deemed necessary to permit non-Indians to hunt eagles, on or off a reservation, in order for the Indian tribes to obtain enough eagle parts for their religious needs. In sum, we are unable to discover a congressional intent in the Eagle Protection Act, its legislative history, or the surrounding circumstances, to abrogate Indian treaty rights even if we set aside the express reference requirement.

[16] The dissent in *White* and the court in *Fryberg* relied upon "the broad wording and the pervasive [conservation] purpose" of the Eagle Protection Act to find congressional intent to abrogate. *United States v. White, supra*, 508 F.2d at 459 (Lay, J., dissenting). *See United States v. Fryberg, supra*, 622 F.2d at 1016. *See also supra*, n.12.

The same is true as to the Endangered Species Act. The only possible indicator of intent to abrogate in the Endangered Species Act is the rejection of a bill which would have specifically excepted American Indians from the purview of the Act. The government posits that rejection of the bill shows that Congress intended that American Indians be subjected to the Act, even when acting within the scope of treaty rights. More plausible explanations exist for rejection of the bill, not the least of which is the possibility that Congress concluded that American Indians are not subject to the Act to the extent they are acting within the purview of a treaty, and that greater protection from the Act was not necessary.

IV. Conclusion

We adhere to *White* and extend its reasoning to criminal prosecutions under the Endangered Species Act. The defendants possessed a treaty right to hunt on their reservation which has not been abrogated by these acts and it has not been found that they exceeded the purview of this right. On this basis we affirm the dismissal of count 12 against Dwight Dion, Sr. Additionally, because the district court erred in finding that the Endangered Species Act abrogated the defendants' treaty rights, we vacate the convictions on counts 8 and 10 against Dwight Dion, Sr., and count 1 against Lyle Dion. The government is free to retry these defendants on counts 8 and 10 against Dwight Dion, Sr., and count 1 against Lyle Dion. If there is a retrial on these counts the jury must determine, under proper instructions, whether the defendants are members of the Yankton Sioux Tribe; whether the takings occurred on the Yankton Sioux Reservation; and if the takings did occur on

the reservation, whether or not the takings were for commercial purposes.

We also find that the defendants have no treaty right to sell parts and carcasses of eagles or scissor-tailed flycatchers commercially. Accordingly, we affirm the district court's refusal to dismiss counts 3, 4, 5, 6, 9, 11, 13 and 14 of the indictment against Dwight Dion, Sr., and count 2 of the indictment against Lyle Dion, which counts charged the defendants with selling parts and carcasses of the birds.

We remand the nontreaty defenses raised on this appeal to a panel of this court.

McMILLIAN, Circuit Judge, with whom BRIGHT and FAGG, Circuit Judges, join, dissenting.

I respectfully dissent. I would overrule the holding in *United States v. White*, 508 F.2d 453, 457-58 (8th Cir. 1974), and would instead adopt the analysis of the dissenting opinion, *id.* at 459-62 (Lay, J., dissenting). *Accord United States v. Fryberg*, 622 F.2d 1010, 1014 (9th Cir. 1980) (Eagle Protection Act, as amended, 16 U.S.C. § 668(a)).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2353

UNITED STATES OF AMERICA, APPELLANT

v.

DWIGHT DION, SR., APPELLEE

No. 83-2521

UNITED STATES OF AMERICA, APPELLEE

v.

ASA PRIMEAUX, SR., APPELLANT

No. 83-2538

UNITED STATES OF AMERICA, APPELLEE

v.

DWIGHT DION, SR., APPELLANT

No. 83-2543

UNITED STATES OF AMERICA, APPELLEE

v.

LYLE DION, APPELLANT

No. 83-2544

UNITED STATES OF AMERICA, APPELLEE

v.

TERRY FOOL BULL, APPELLANT

Appeals from the United States District Court
for the District of South Dakota

Submitted: June 11, 1984

Filed: May 20, 1985

Before HEANEY, JOHN R. GIBSON and FAGG Circuit Judges.

HEANEY, Circuit Judge.

Dwight Dion, Sr., Lyle Dion, Jr., Asa Primeaux, Sr., and Terry Fool Bull appeal their convictions of "taking" or "selling" eagles and other protected migratory birds or bird parts in violation of the Bald and Golden Eagle Act (BGEA), 16 U.S.C. §§ 668-668d (1982), the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712 (1982), and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1982). As the appeals stood when we first heard oral arguments, the four appellants raised ten issues, one of which was whether, under *United States v. White*, 508 F.2d 453 (8th Cir. 1974), the charges against the Dions should be dismissed. In *White*, we hold that an enrolled member of the Red Lake Band of Chippewa Indians who shot at an eagle within the boundaries of the Red Lake Reservation could not be convicted of "taking" an eagle under section 668 of the BGEA because Congress had not expressly provided that this section abrogated Indian treaty rights to hunt on their reservations.

We certified the treaty issues to the Court *en banc* which adhered to *White*, applied it to members of the

Yankton Sioux Tribe hunting within the confines of their reservation, and extended *White* to criminal prosecutions under the ESA. The Court held, however, that *White* did not extend to "selling" protected birds or their parts or "taking" protected birds or their parts for commercial purposes.[1] Accordingly, the Court affirmed the district court's dismissal of one "taking" count against Dwight Dion, Sr., vacated and remanded for retrial, at the government's option, two "taking" counts against Dion, Sr., and one "taking" count against Lyle Dion and affirmed the remaining eight "selling" counts against Dion, Sr., and one "selling" count against Dion, Sr., and one "selling" count against Lyle Dion. The *en banc* Court noted that Terry Fool Bull and Asa Primeaux, Sr., did not raise the treaty issues on appeal, but that, in any event, *White* was not applicable to their cases because their allegedly criminal acts were not committed on land reserved to an Indian tribe of which they were members. The *en banc* Court then remanded the appeals of the Dions, Fool Bull and Primeaux, Sr., to this panel to determine the remaining nontreaty issues. Before turning to an examination of the issues, we set forth the significant facts which relate to all four appellants.

I. FACTS.

These cases involve criminal prosecutions which arose from a United States Fish and Wildlife Service (FWS) undercover operation ("Operation Eagle")

[1] Because all the counts under the MBTA were for "selling" protected migratory birds, we did not reach the question whether *White* might bar a prosecution under that Act of an Indian for "taking" a protected bird within the confines of the reservation.

conducted in South Dakota from February 25, 1981, to June 15, 1983, to investigate the killing and selling of eagles and other protected birds. The government claims that it first learned of possible killing of protected birds in South Dakota in 1978 when FWS agent John L. Cooper received reports that "an excess number of birds were being picked up" around the Yankton Sioux Reservation near Lake Andes, South Dakota.[2] Agent Cooper began an investigation to determine if individuals were violating federal wildlife laws and, in 1980, "actively" assigned an agent to do investigation in the area. In 1980, a Navaho medicine man in New Mexico told FWS agents that Indian crafts made with protected bird parts were arriving from South Dakota for sale in New Mexico. The medicine man gave FWS agent Nando Mauldin the names of the five alleged suppliers in the Lake Andes area of South Dakota. Shortly thereafter, "Operation Eagle" began.

Mauldin sent letters to the five alleged suppliers from the Lake Andes area advising them that he "was a trader in the Southwest part of the United States * * * interested in obtaining Indian-made items for resale throughout the Southwest." In the fall of 1980, he received a response from Joe Abdo

[2] Harry T. Stone, Refuge Manager for the FWS at Lake Andes, South Dakota, testified at Dwight Dion, Sr.'s, trial, however, that in 1981, there were not a lot of deaths of bald or golden eagles on any of the wildlife refuges in the Lake Andes area. Mr. Stone also testified that the Carl Mundt National Wildlife Refuge was established for the specific purpose of protecting bald eagles, and that it is one of the largest wintering areas for bald eagles in the lower forty-eight states, that the refuge is not open for public access, and that he had never seen any of the defendants within the Carl Mundt Refuge or in the other refuges.

of Lake Andes inviting him to South Dakota and indicating that Abdo and several other individuals would sell eagle feathers to Mauldin. Mauldin traveled to South Dakota to meet Abdo, and on February 25, 1981, was introduced to several Indians who traded in Indian crafts, including Asa Primeaux, Sr., and Dwight Dion, Sr. Mauldin claimed that his fictitious company, Night Hawk Trading Company, would pay "top dollar" for Indian handcrafts made from eagle or other protected bird feathers, or for parts of protected birds. On that day, Mauldin passed out approximately $2,000 in cash for several fans and other Indian crafts made from protected bird feathers and handed out several business cards.

Over the next year and a half, Mauldin visited the Yankton Reservation area several times and apparently paid several thousand dollars to a number of Indians, including appellants Asa Primeaux, Sr., and Dwight Dion, Sr., for Indian fans made from protected bird feathers, and for various protected bird feathers and parts. Mauldin passed out more business cards, and this willingness to pay handsomely for crafts made from protected bird parts or for the parts alone became well-known in the area. By August of 1982, the government had compiled substantial evidence of trafficking in protected bird parts against several Indians, including Dion, Sr., and Primeaux, Sr. Rather than prosecuting these individuals, who proved to be the main actors in the protected bird and feather trade, the government expanded "Operation Eagle" in August, 1982, by assigning a second agent, Robert Standish, to the undercover operation.

Standish made several visits to the Yankton Reservation, and represented himself as an Indian art

dealer and owner of a gallery. During the late summer and fall of 1982, he and Mauldin passed out more business cards on the Reservation and paid out more money to several Indians including Primeaux, Sr., for Indian crafts made from protected bird feathers and parts, and for the feathers and parts themselves. The agents also offered several hundred dollars for each whole protected bird.

Word spread throughout the Yankton Reservation that Mauldin and Standish were paying thousands of dollars in cash for protected bird artifacts, feathers, parts and whole birds. This reservation is located in a remote and desolate area of South Dakota, and is one of the most impoverished areas in the nation. The 1980 census reports that the 1979 per capita income on the Yankton Sioux Reservation was less than $2,500, and more than half of all families on the Reservation were below the poverty level. Nearly a third of all persons on the Reservation, including two of the appellants in this case, Terry Fool Bull and Asa Primeaux, Sr., report Lakota as their primary language.

In December of 1982, nearly two years after Operation Eagle began, the agents purchased their first whole protected birds when they gave Dion, Sr., $2,300 for the carcasses of four eagles. At this time, the agents also made their first and only transaction with Lyle Dion, Jr., when they purchased an eagle tail and then the rest of the eagle from him.

The agents still made no arrests, however, and over the next several months paid several thousand more dollars to Dwight Dion, Sr., for an additional four bird carcasses, to Asa Primeaux, Sr., for three bird carcasses, and in their first and only transaction, to Terry Fool Bull, Asa's son-in-law, for an eagle carcass.

The Dions, Primeaux, Sr., and Fool Bull were subsequently tried, convicted and sentenced to prison. We turn now to the contentions of each appellant.

A. Dwight Dion, Sr.

Dwight Dion, Sr., was convicted of ten counts of violating the BGEA, the ESA and the MBTA. The specific sections violated are set forth in detail in the *en banc* decision of this Court which vacated and remanded two of Dion, Sr.'s, ten counts. Dion, Sr., now raises four arguments why all ten counts, or at least certain of the counts, should be dismissed outright.

1. *Religious Freedom.*

Dion, Sr., first contends that his conviction for "taking" and "selling" eagles and other migratory birds under the BGEA, the ESA and the MBTA violates his first amendment right of religious freedom. He also notes that 42 U.S.C. § 1996 (1982) provides that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian * * * including but not limited to * * * possession of sacred objects[.]" Additionally, Public Law 95-341, which enacted 42 U.S.C. § 1996, provides in part that "laws designed for such worthwhile purposes as conservation and preservation of natural species * * * were never intended to relate to Indian religious practices" or to "prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies[.]"

The district court found that it "is clear from the record herein that possession and transportation of

eagle feathers and parts of eagles are integral parts of Indian religious practices." However, the court noted that Indians can acquire eagles and eagle parts from a government depository in Pocatello, Idaho, and thus, there is no need for Indians to kill eagles for religious purposes. Dion, Sr., contends that making Indian artwork from protected feathers is a part of his religious culture and that unless he can make and sell these items, he will be denied an opportunity to practice his religion fully.

The government contends that Dion, Sr., was taking and selling birds purely for commercial gain. It also notes that Dion, Sr., has never stated that the Native American Church of North America or his local chapter sanctions the killing of eagles, and that at least one court has found that the killing and selling of eagles and eagle parts is against tribal custom and religion. *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976). We also note that several Indian leaders testified at a consolidated hearing on September 2 and 6, 1983, that the killing of eagles, at least for commercial purposes, is contrary to Native American beliefs, and was generally an unknown practice on the reservations in South Dakota, at least before Operation Eagle began. Additionally, Douglas Long, current president of the Native American Church of North America, testified that Article II of the church's laws provides that the church "looks with disfavor on the practice of the pawn and sale of religious prayer instruments" which include feather fans.

We agree with the government and affirm the district court's ruling. The record reveals that Dion, Sr., was killing eagles and other protected birds for commercial gain and not for religious purposes, and

thus his religious freedom argument is without merit. *See Top Sky*, 547 F.2d at 485.

2. *Selective Prosecution.*

After his trial, Dwight Dion, Sr., moved to overturn his convictions and dismiss the indictments on the ground he was selectively prosecuted. He also claims that the government had been served with materials in two other prosecutions under "Operation Eagle" which supported the selective prosecution claim and should have been turned over to him under *Brady v. Maryland*, 373 U.S. 83 (1963). These materials contain the following: (1) numerous advertisements in national magazines offering for sale Indian art items allegedly containing protected bird feathers or parts; (2) a picture of a famous entertainer wearing an alleged bald eagle feather headdress while performing at the White House before a group which included then-Secretary of Interior James Watt; and (3) pictures of an Indian shield attached to which are several protected bird feathers. Dion claims the shield was purchased at a Mt. Rushmore store run by white proprietors and that the proprietors were not prosecuted. Dion, Sr., claims that the government was not prosecuting whites who dealt in protected bird feathers and parts but had prosecuted only Indians because of their race. The trial court denied the motion, and Dion, Sr., appeals this ruling.

The government contends that under Fed. R. Crim. P. 12(b)(1) and 12(f), Dion, Sr.'s, selective prosecution motion was untimely because it was not made prior to trial. We agree. A selective prosecution claim "brings into question the institution of the prosecution; Rule 12(b) requires such issues to be raised prior to trial." *United States v. Jarrett*, 705 F.2d

198, 205 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 995 (1984).

3. *Unconstitutional Delegation of Legislative Authority.*

Dion, Sr., next contends that the district court erred in refusing to dismiss his six counts of selling migratory birds in violation of the MBTA because section 3 of the MBTA, 16 U.S.C. § 704 (1982), which authorizes the Secretary of Interior to promulgate regulations establishing who may take or possess migratory birds, constitutes an unlawful delegation of legislative authority to the executive branch. Dion, Sr., claims that section 3 of the MBTA, 16 U.S.C. § 704, lacks definite standards, as required by *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), to guide the Secretary in deciding who should be exempted from prosecution under 16 U.S.C. § 703.

In response, the government notes that several courts have upheld the validity of the delegated rulemaking authority in 16 U.S.C. § 704. *See, e.g., Bailey v. Holland*, 126 F.2d 317, 321 (4th Cir. 1942); *Cerritos Gun Club v. Hall*, 96 F.2d 620, 629 (9th Cir. 1938); *United States v. Griffin*, 12 F. Supp. 135, 137-38 (S.D. Ga. 1935). It also points out that section 704 does contain definite criteria to guide the Secretary's rulemaking authority because it provides that the Secretary's regulations shall be "compatible with the terms of the conventions" enumerated in 16 U.S.C. § 703. It notes that these conventions identify clear standards for determining when and for what purposes migratory birds may be taken or possessed. *See, e.g.*, 1916 Convention with Great Britain, 39 Stat. 1702 (Aug. 16, 1916). Dion, Sr., however, agrees that section 704 sets forth adequate standards

under which the Secretary can determine *when* and for *what purposes* migratory birds can be taken or possessed, but argues there are inadequate standards on *who* should be allowed to take or possess these birds.

We find, however, that the standards set forth in section 704 on when and for what purposes migratory birds can be taken also give the Secretary sufficient guidance on who should be allowed to take migratory birds. Section 704 and the conventions enumerated in section 703 essentially provide that, in limited situations, migratory birds can be taken for scientific or educational purposes. Consistent with this, the Secretary's regulations on who can take or possess migratory birds permit the taking of these birds or their parts by persons or institutions who need them for certain specified scientific or educational purposes. 50 C.F.R. § 21.12 (1984).[3] Finally, we agree with the government that section 704 does not unconstitutionally delegate legislative authority because the Secretary has not promulgated regulation permitting Indians to sell migratory birds or their parts.

4. *Equal Protection.*

Dion, Sr.'s, final argument is quite similar to the unlawful delegation argument discussed above. He

[3] The regulations also grant limited exceptions for captive-reared migratory waterfowl, 50 C.F.R. §§ 21.13 and 21.14 (1984), for falconry under stringent federal falconry standards, 50 C.F.R. §§ 21.28 and 21.29 (1984), and for limited "special purposes * * * upon a showing of benefit to the migratory bird resource, important research reasons, humane, or other compelling justification." 50 C.F.R. § 21.27 (1984). At trial, the applications examiner for the FWS Division of Law Enforcement testified that, in some very limited situations, permits to kill golden eagles may be issued where they have become predators of domestic animals.

argues that his six convictions for selling migratory birds or their parts in violation of the MBTA must be reversed because the regulations promulgated by the Secretary of Interior pursuant to 16 U.S.C. § 704, which do not include an exemption permitting Indians to sell migratory birds or their parts, deny him equal protection of the law. We reject this argument because the regulations do not permit anyone, Indian or non-Indian, to sell migratory birds or their parts for commercial purposes unrelated to education or science.[4] Therefore, the MBTA applies neutrally to all persons.

We also reject Dion, Sr.'s, claim that the regulations, even if neutral, deny Indians equal protection because they fail to recognize that Indians have a unique need to "take" and "sell" eagles for commercial purposes. The record reveals that Dion, Sr., was one of extremely few Indians in the area who were taking or selling eagles and that the sale of eagles is contrary to Native American beliefs and practices. Dion, Sr.'s, claim is contrary to fact.

B. Lyle Dion.

Lyle Dion was convicted of violating 16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) (1982) of the ESA by taking a bald eagle (Count 1), and violating 16 U.S.C. §§ 703 and 707 (1982) of the MBTA by offering for sale or selling a bald eagle (Count 2).

[4] Dion, Sr., also apparently argues that these regulations deny him due process because they fail to recognize the need American Indians have for bird feathers and parts as a component of their heritage and religion. We reject this claim because the Secretary has made provision for Indians to receive eagle feathers for noncommercial use from a government depository in Pocatello, Idaho.

Count 1 was vacated and remanded by the Court *en banc* on Dion's treaty defense and his remaining defenses were remanded for consideration by the panel. He raises two issues: (1) whether the court erred by refusing to dismiss the indictment for selective prosecution; and (2) whether he was entrapped as a matter of law by government agents into taking and selling the bald eagle.

Because Dion's selective prosecution claim was raised for the first time after the trial was completed, we reject this claim because it was not timely, as we stated above.

Dion's entrapment claim raises a more difficult question, an understanding of which requires a thorough review of the elements and rationales of the entrapment defense.

1. *The development of the entrapment defense as a bar to prosecution of "innocent" persons tempted into a violation of the law.*

The Supreme Court first suggested the possibility of an entrapment defense in the *Decoy Letter Cases*. *Price v. United States*, 165 U.S. 311 (1897); *Rosen v. United States*, 161 U.S. 29 (1896); *Goode v. United States*, 159 U.S. 663 (1895); *Grimm v. United States*, 156 U.S. 604 (1895). In those cases, several defendants challenged their convictions of using the mails to distribute obscene materials across state lines on the ground the obscene material had been solicited by federal undercover agents. Although the Court affirmed the convictions without specifically discussing an entrapment defense, it wrote that the convictions could stand even though the contraband was solicited by a government agent because the undercover agent "suspect[ed] that the defendant was engaged in a

business offensive to good morals, sought information directly from him [and it] does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." *Grimm v. United States*, 156 U.S. at 610.

Twenty years later, the Ninth Circuit became the first federal court to overturn a conviction on grounds of entrapment. *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915). That Court reviewed several state cases which established the principle "that a case is not within the spirit of the Criminal Code where an officer 'originates the * * * intent, and apparently joins the defendant in the criminal act first suggested by the officer, merely to entrap the defendant.'" *Id.*, at 415 (citation omitted). The Court quoted several cases, including *Saunders v. People*, 38 Mich. 218 (1878), in which Justice Marston wrote:

> Some courts have gone a great way in giving encouragement to detectives, in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing.

Woo Wai, 223 F. at 416.

Applying these principles, the *Woo Wai* Court overturned the defendant's convictions of conspiracy to bring Chinese persons into the United States because, "[t]here is no evidence that, prior to the time when the detectives first approached Woo Wai, any of the

defendants had even been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws." 223 F. at 414.

In *Butts v. United States*, 273 F. 35 (8th Cir. 1921), this Court relied on these principles underlying the entrapment defense in reversing Butt's conviction of selling morphine. Judge Sanborn wrote that:

> There was ample, if not conclusive, evidence * * * that * * * [t]he defendant had never committed any such offense as the officers of the government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by this testimony. There is no evidence that he had ever contemplated, much less intended to sell any morphine. He had never done so.

273 F. at 38.

Judge Sanborn also indicated that:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. * * * It is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it.

Id. (passage cited with approval in *Sorrells v. United States*, 287 U.S. 435, 444 (1932)).

In *Casey v. United States*, 276 U.S. 413 (1928), *overruled on other grounds, Turner v. United States*, 396 U.S. 398 (1970), the Court refused to consider Casey's claim that government agents improperly induced him to sell narcotics to prison inmates because he failed to raise that claim at trial. *Id.* at 418-19. However, the Court implicitly approved the investigative technique because "there was probable cause to believe Casey was a habitual" drug user who had supplied drugs to inmates on previous occasions and because he "was in no way induced to commit the crime beyond the simple request of Cicero to which he seems to have acceded without hesitation and as a matter of course." *Id.* at 419. Justice Brandeis, joined by Justice Butler, dissented on the ground the prosecution "must fail because officers of the government instigated the commission of the alleged crime." *Id.* at 421. He distinguished government investigations of ongoing criminal schemes from those in which the government instigates the commission of the crime:

> I am aware that courts—mistaking relative social values, and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the government; that the act for which the government seeks to punish the defendant is the fruit

> of their criminal conspiracy to induce its commission. The government may set decoys to entrap criminals. But it may not provoke or create a crime, and then punish the criminals, its creature. If Casey is guilty of the crime of purchasing 3.4 grains of morphine, on December 31st, as charged, it is because he yielded to the temptation presented by the officers.

Two months later, Justice Brandeis reiterated his view in the following celebrated passage from his dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

> Decency, security, and liberty alike demand that government officials shall be subjected to the rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[5]

[5] Justice Holmes also dissented on the ground that "the Government should not itself foster and pay for other crimes." 277 U.S. at 470.

Justice Brandeis's view that the entrapment defense should focus on the conduct of the enforcement officials, although adopted in later years by several justices of the Supreme Court and several state supreme courts, however, has never commanded a majority of the Supreme Court. Nonetheless, his view that entrapment is concerned with the "origin of intent" to commit the crime is reflected in the modern view that entrapment focuses on the "predisposition" of the defendant to commit the crime.

Illustrative is *Sorrells v. United States*, 287 U.S. 435 (1932), where Chief Justice Hughes, writing for the Court, focused on the defendant's state of mind, noting that he was "a person otherwise innocent whom the Government is seeking to punish from an alleged offense which is the product of the creative activity of its own officials." *Id.* at 351. The court held that:

> We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

Id. at 448.[6]

In *Sherman v. United States*, 356 U.S. 369 (1958), the Court reaffirmed that the law of entrapment is designed to prevent "tempting innocent persons into violations." *Id.* at 372. Applying the predisposition

[6] Justice Roberts, concurring, joined by Justices Brandeis and Stone, wrote that "[t]he applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents." 287 U.S. at 459.

test outlined in *Sorrells*, the Court found that Sherman was entrapped as a matter of law because the evidence revealed that he was an innocent, although perhaps ductile, party who was beguiled into committing a crime he otherwise would not have attempted.[7]

In *Lopez v. United States*, 373 U.S. 427 (1963), the defendant contended that the trial court's entrapment instruction, to which he failed to object, constituted plain error. The Court held that "we need not * * * concern ourselves with any of these questions here, for under any approach, petitioner's belated claim of entrapment is insubstantial[.]" *Id.* at 434. The evidence was clear that Lopez had made an unsolicited offer of $420 to an I.R.S. agent to drop his investigation of Lopez's failure to pay a cabaret tax. The I.R.S. agent had never even suggested that he would drop his investigation in exchange for money favors. Accordingly, Lopez had no claim of entrapment because:

> [t]he conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible strategems involved in the detection and prevention of crime.

Id. (emphasis in original).

In its two most recent rulings on the defense of entrapment, the Court has reemphasized that this

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[7] Justice Frankfurter, concurring, joined by Justices Douglas, Harlan, and Brennan, wrote that a prosecution should be barred, without regard to the defendant's culpability, if police conduct falls below standards for proper use of governmental power.

defense focuses on the defendant's "predisposition" to commit the crime, and requires courts to draw a line between traps for the "unwary criminal" and the "unwary innocent." In *United States v. Russell*, 411 U.S. 423 (1973), a five-to-four majority reinstated the defendant's conviction of unlawfully manufacturing methamphetamine where he admitted "that he may have harbored a predisposition to commit the charged offenses," *id.* at 433, and where the evidence confirmed that he was predisposed because he was involved in the illegal manufacturing of methamphetamine both before and after the undercover agent provided an essential ingredient for the manufacturing of the drug. The Court, *in dicta*, noted that "outrageous" law enforcement conduct might bar the government under due process principles from invoking judicial process to obtain a conviction. *Id.* at 431-32.

In *Hampton v. United States*, 425 U.S. 484 (1976), Hampton alleged that an undercover agent supplied him with drugs which were subsequently purchased by another government agent involved in the operation. Because Hampton admitted that he was predisposed to commit the crime, this Court and the Supreme Court, five-to-three, refused to consider the propriety of the agent's conduct and affirmed Hampton's conviction. Chief Justice Burger, and Justices White and Rehnquist, wrote that the due process bar to a conviction in an entrapment case is limited to situations in which the defendant is not predisposed. 425 U.S at 488-90. However, Justices Powell and Blackmun, concurring in the judgment, and Justices Brennan, Stewart and Marshall, dissenting, determined that the due process protection against outrageous governmental conduct is available even when the defendant has been shown to be predisposed. Jus-

tice Stevens took no part in the consideration or decision of the case.

In sum, as we recently noted in *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984):

> [A]lthough the Supreme Court has sharply divided on the proper standard for applying the entrapment defense, it is generally agreed that "[t]he conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents." * * * The key question is therefore whether the government agent caused or induced the defendant to commit a crime he was not otherwise predisposed—i.e., willing and ready—to commit whenever a propitious opportunity arose.

Id. at 1293 (citations omitted).

We also held, in accordance with the prevailing case law, that the prosecution must prove a defendant's predisposition beyond a reasonable doubt. *Id.* at 1294 n.3, (citing *United States v. French*, 683 F.2d 1189, 1191 n.1, *cert. denied*, 459 U.S. 972 (1982); *United States v. Jannotti*, 673 F.2d 578, 597 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982).

2. *Did the prosecution prove beyond a reasonable doubt that Lyle Dion was predisposed to take or sell an eagle?*

The government suggests that we eschew an examination of the myriad factors used by the courts to determine predisposition by arguing that Dion's predisposition is proven beyond a reasonable doubt solely because the undercover agents allegedly did nothing more than afford him the opportunity to sell

an eagle to them. The government used this argument below in an attempt to keep the entrapment issue from the jury, and when the trial court rejected this, to convince the jury that Dion could not possibly have been entrapped.

We cannot agree with the government that its agents did nothing more than provide Lyle Dion with an opportunity to commit the crime as these terms have been construed by the courts. While Asa Primeaux, Sr., and Dwight Dion, Sr., readily responded to the government's offers to buy protected birds or their parts, Lyle Dion did not. Dion was first afforded an opportunity to receive a large sum of money for eagle parts on February 25, 1981, when Agent Mauldin visited his father's home and extended an offer of money for protected bird crafts to all who were present, including Lyle Dion. Dwight Dion, Sr., testified that Mauldin had visited his home several times and that, in July of 1982, "he asked my boy, Lyle, if he can go out and get him some birds." Lyle also testified that Mauldin had asked him to kill eagles for him.

In addition to being directly solicited to kill and sell eagles, Lyle claims that he was indirectly induced to do so throughout 1981 and 1982, as word spread throughout the Yankton Reservation that Mauldin and Standish were offering big sums of money for protected bird feathers, crafts, and whole eagles. Lyle also suggests that during this nearly two-year period when his father was building a relationship of friendship and trust with Mauldin and receiving hundreds of dollars for protected bird crafts and offers of additional money for whole birds, his father encouraged him to kill an eagle for Mauldin.

We need not address here whether an individual can ever be indirectly entrapped through government inducements directed to him solely by an unwitting middleman [8] because the government agents not only indirectly solicited Dion to sell him an eagle, but they also directly extended to him at least one offer to purchase an eagle. The important point is not that this conduct by the government agents was necessarily outrageous,[9] but that Lyle was not merely given an opportunity to take or kill an eagle but was encouraged to do so by the agents' repeated direct

[8] *See, e.g., United States v. Valencia,* 645 F.2d 1158, 1168 (2d Cir. 1980); *United States v. Anderton,* 629 F.2d 1044, 1047 (5th Cir. 1980); *Johnson v. United States,* 317 F.2d 127, 128, 129 n.1 (D.C. Cir. 1963); Note, *Entrapment Through Unsuspecting Middlemen,* 95 Harv. L. Rev. 1122, 1129 n.39 (1982).

[9] The government began its investigation with a good lead on the individuals who were involved in protected bird trafficking in the Lake Andes area. Within six months, it had gathered enough evidence to prosecute those individuals who proved to be the main actors in the trafficking. Nonetheless, the government extended its operation for nearly two additional years.

The recently formulated Attorney General's Guidelines on FBI Undercover Operations "attempt to minimize the possibility of overly persistent solicitation by limiting the duration of an undercover operation initially to six months." Gershman, *Abscam, The Judiciary, and the Ethics of Entrapment,* 91 Yale L. J. 1565, 1586 n.100 (1982). The government, in its brief on appeal, has not explained its reasons for extending its operation for so long. Our review of the record suggests that the reason it did so was to prevent the unraveling of its undercover operations in other states and to attempt to detect the buyers of protected bird parts. In light of these considerations, we do not believe that the government's conduct was so outrageous that it amounts to a due process violation;

and indirect solicitations over a nearly two-year period. *See United States v. Valencia,* 645 F.2d 1158 (2d Cir. 1980). Under these circumstances, we cannot agree with the government that Lyle Dion readily and willingly responded to a mere opportunity to kill an eagle for profit.

In any event, determining whether Dion was predisposed requires an examination not only of the government's conduct, but more importantly of several factors which relate to Dion's character, background and state of mind. The government's suggestion that we should look only at the nature of the inducements offered is based on a sentence in *Sorrells* that "[i]t is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Id.,* 287 U.S. at 441. However, the Court continued by saying that "[a]rtifice and stratagem may be employed to catch *those engaged in criminal enterprises,*" and that a "different question is presented when the criminal design originates

however, we believe that we must make a searching examination into the "predisposition" of those Indians who were, at the later stages of "Operation Eagle," eventually tempted by the offers of large sums of money—which apparently, in the cases of some individuals, spelled the difference between having and not having heat and food. Although the government's extension of its undercover operation for an unusually extended period of time in an attempt to convict the buyers of protected birds properly recognizes that these buyers pose the greatest threat to protected wildlife, the consequence of this is that the longer and more involved the government became in buying protected birds and their parts, the greater the risk became that birds would be unnecessarily killed by individuals who would never have done so in the absence of the government's offers.

with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense[.]" *Id.* at 442 (emphasis added). The Court cited with approval the principle enunciated by Circuit Judge Woods that "[i]t is well settled that decoys may be used to entrap *criminals*, and to present opportunity to one intending or willing to commit crime. *But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime.*" *Id.* at 445 (emphasis added).

In determining whether Sorrels was predisposed, the Court looked not only at the nature of the agent's inducements, but also at whether "the act for which defendant was prosecuted was instigated by the prohibition agent," 287 U.S. at 441, whether there was any evidence that Sorrels had ever sold liquor before, and whether Sorrels had a reputation as a law-abiding citizen. In its several later cases on entrapment, the Court has also engaged in a flexible, multi-factor analysis of predisposition. In *Sherman*, the Court looked to the fact that Sherman was susceptible to the persistent solicitation of the government agent because he was an ex-addict undergoing rehabilitation, that there was no evidence that he was in the narcotics trade, that the agent played on his feigned friendship with Sherman, and that a search of Sherman's apartment after the arrest produced no narcotics. In *Lopez*, Lopez made a completely unsolicited bribe to the IRS agent. His conduct in the negotiations with the IRS agent also evidenced his predisposition. In *Russell*, Russell admitted that he might have been predisposed, and the evidence indicated that he was involved in manufacturing drugs both

before and after the undercover agent assisted him. In *Hampton*, Hampton admitted that he was predisposed to commit the crime. A common strand throughout the cases is that a person is not predisposed if he is an "innocent" person who would not have committed the offense in the absence of the undercover agent's offer.

The lower courts have looked to a variety of factors in determining predisposition,[10] including: (1)

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[10] Although we do not agree with the government that its agents merely afforded Dion an opportunity to commit the crime or that Dion readily responded to the agents' solicitations, we note that several courts have determined that predisposition is not necessarily proven solely by evidence that the defendant readily responded to an opportunity to commit a crime; instead, they have preferred to determine predisposition by reference to several factors in addition to the nature of the government's inducements and the defendant's response. *See, e.g., United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933) (Learned Hand, J.) ("We do not wish to commit ourselves to the doctrine that mere readiness is enough. * * * The whole [entrapment] doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist. Such an emotion is out of place, *if they are already embarked in conduct morally indistinguishable, and of the same kind.*"); *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (Predisposition is present only where the accused was seeking "to realize his preexisting purpose" and was "awaiting any propitious opportunity to commit the offense."); *United States v. Bower*, 575 F.2d 499 (5th Cir.), *cert. denied*, 439 U.S. 983 (1978) ("The Government's provision of aid, incentive, and opportunity for commission of the crime amounts to an entrapment only if it appears that the defendant has done that which he would never have done were it not for the inducement of Government operatives."). *See also State v. Luster*, 295 S.E.2d 421, 435-36 (N.C. 1982) (Exum, J., dissenting) ("I am cognizant of the need for

whether the defendant readily responded to the inducement offered, *United States v. Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984); (2) the circumstances surrounding the illegal conduct, *id.*; (3) " 'the state of mind of a defendant before government agents make any suggestion that he shall commit a crime,' " *id.*, citing *United States v. Williams*, 705 F.2d 603, 618 (2d Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 524-25 (1983); (4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged, *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971); (5) whether the defendant had already formed the "design" to commit the crime for which he is charged, *id*:; (6) the defendant's reputation, *Russell*, 411 U.S. at 443 (Stewart, J., dissenting); *United States v. Goessel*, 440 F.2d 602 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971); (7) the conduct of the defendant during the negotiations with the undercover agent, *United States v. Costello*, 483 F.2d 1366, 1368 (5th Cir. 1973); (8) whether the defendant has refused to commit similar acts on other occasions, *Kadis v. United States*, 373 F.2d 370, 374 (1st Cir. 1967); (9) the nature of the crime charged, *United States v. Jannotti*, 673 F.2d at 604 (3d Cir.

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undercover 'sting' type operations in ferreting out crime. So long as these operations merely provide opportunity for persons *predisposed to criminal activity* to engage in it and be 'stung,' I applaud the officers for their energy and ingenuity. An operation, on the other hand, that encourages and incites criminal activity on the part of people who would otherwise have refrained from such activity has no place in the law enforcement arsenal. * * * Specifically, 'sting' operations such as [this one] must serve only to detect criminal activity and not instigate it." (emphasis added)).

1982 (en banc) ("the very acceptance of a bribe [by a public official] * * * may be evidence of a predisposition to do so * * *."); *United States v. Dickens*, 524 F.2d 441, 445 (5th Cir. 1975), *cert. denied* 424 U.S. 994 (1976) ("Ability of these defendants to supply large quantities of marijuana shortly after they had been requested to do so was probative evidence of predisposition."); *cf. Hampton*, 425 U.S. 497 n.7 (Powell, J. and Blackman, J., concurring.) (One who buys or sells narcotics may have a more difficult burden in resisting the government's proof of predisposition); and (10) "[t]he degree of coercion present in the instigation law officers have contributed to the transaction" relative to the "defendant's criminal background," *United States v. Townsend*, 555 F.2d 152, 155 n.7 (1977). In *United States v. Lard*, 734 F.2d at 1293, we relied on *Townsend* for the principle that, "[d]etermining a defendant's predisposition requires examination of the defendant's personal background to see "where he sits on the continuum between the naive first offender and the streetwise habitue."

Dion argues that the application of several of these tests evidences his lack of predisposition. He claims, without refutation by the government, that he had never killed a protected bird before,[11] had never been

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[11] This is strongly supported by the tapes secretly made at the home of Dwight Dion, Sr., on December 13, 1982, and March 10, 1983. At the December 13 encounter, Dwight, evidencing his trust in Mauldin and Standish, freely responded to their question on how many eagles he killed a year by indicating that he killed as many as four. When Lyle Dion later arrived at his father's home with the tail feathers from an eagle, Dwight indicated that this was the first eagle Lyle had ever killed. Lyle confirmed this. Dwight suggested this once

involved in making or selling protected bird crafts, had never had a desire to kill a protected bird before he was induced to do so by the government agents,[12] and believed it was against his Native American religious beliefs to shoot an eagle.

That he had never killed an eagle before December 1982 is particularly relevant under the government's claim that there was a market in the Lake Andes area for protected birds and their parts prior to the onset of "Operation Eagle," [13] because it reveals that Lyle had the opportunity to kill and sell eagles for profit before the onset of "Operation Eagle," but had never done so. Thus, the evidence suggests that Dion was not ready and willing to take and sell an eagle whenever a propitious opportunity arose.

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again at his March 10, 1983 meeting with the agents when he said that he was the only one in the area that he knew of who was killing eagles.

[12] The government admitted at the trial below that it had never heard from any of its sources, including Dion's father, Dwight Dion, Sr., that Lyle was involved in taking or selling protected birds or their parts.

[13] Several Indians testified at the trials below that there was no market for protected birds before the government created the market. The government, however, argued that there was a market and that it had prosecuted at least one buyer. It also suggested that Dwight Dion, Sr., had ready access to a buyer in Minnesota and to buyers in the Southwest United States. Although the evidence reflects that the government agents were the major buyers of protected birds and their parts in the Lake Andes area throughout the 1981-83 period, we must resolve the evidentiary conflict in favor of the jury's verdict and thus conclude that, prior to the onset of "Operation Eagle," there was a private market for eagles in the Lake Andes area, at least for the Dion and Primeaux families.

Lyle's lack of predisposition is also evidenced by his conduct during the negotiations with the government agents for sale of the eagle tail feathers and carcass. Our review of the tape of December 13, 1982, strongly indicates that Lyle Dion is not a "streetwise criminal" but instead is a "naive first offender." [14] *See Lard*, 734 F.2d at 1293. He seemed to know nothing about the protected bird trade and indicated that he had no idea how to price an eagle. He had to ask his father how much he thought an eagle would sell for. His attitude also reflects that of an unwary and innocent adolescent drawn into the agent's trap through their "friendship" with his father and the large amount of money offered.

Next, when the agents asked Lyle if they could buy the rest of the eagle, he declined to sell it to them, indicating that he had given it to his "brother-in-law" for a religious ceremony. Lyle finally agreed to retrieve the rest of the eagle only after the agents repeatedly requested that he do so. Additional evidence of Dion's lack of predisposition is that he never again sold an eagle to government agents or to anyone else.

Finally, we believe that the government's offer of a substantial sum of money for protected birds or their parts over the nearly two-year period before Dion became involved reflects a lack of predisposition when considered against his lack of sophistication and his severe poverty. We agree, of course, that an individual cannot claim that he was entrapped simply because he was poor and could not resist the substantial sums of money to be made through criminal

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[14] We also note that there is no record evidence that Dion has ever previously been convicted of any crime. Additionally, the government does not contest his claim of a good reputation as a law-abiding individual.

activity. For example, in *United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982), the Court, refused to decide whether "the dollar amount offered [is] relevant to disprove predisposition," *id.* at 599, but noted that $30,000 is not "so large or generous as to overcome an official's natural reluctance to accept a bribe." *Id.* As a general matter, we also agree with the Tenth Circuit's conclusion in *United States v. Lambinus*, 747 F.2d 592, 598 (10th Cir. 1984), that one's poor financial condition and difficulty in finding a job may not, in the vast majority of cases, be relevant to the question of whether he was entrapped. Thus, because of other evidence of their predisposition, neither Dwight Dion, Sr., or Asa Primeaux, Sr., could claim entrapment simply because they were so poor they could not resist the chance to make some money.

However, in some cases, it may be that the unusual poverty of the defendant or other problems peculiar to the defendant must be considered in determining predisposition. In *Sherman v. United States*, 356 U.S. 369, 376 (1958), for example, the Court emphasized the government's exploitation of the weakness of the defendant, who was trying to overcome a narcotics habit. Justice Frankfurter, concurring, condemned "[a]ppeals to sympathy, friendship, [and] the possibility of exorbitant gain." *Id.* at 307-08.

In this case, the government agents came upon an extremely impoverished Indian Reservation in a desolate area of South Dakota where, according to some of the witnesses at the trial below, life is for many Indians, a mere question of simple survival. The risk for the government in offering so much money to these individuals over a nearly two-and-one-half year period was that many who would never have shot a protected bird would be enticed into doing so.

In sum, we recognize this is a close and difficult question. Viewing the evidence in the light most favorable to the government, we find a lack of evidence that Dion was predisposed to kill and sell eagles and significant evidence that he was not predisposed. If we are to give any meaning to the reasonable doubt standard, we cannot conclude that a reasonable jury could have found beyond a reasonable doubt that Dion was predisposed. Accordingly, we hold that he was entrapped and reverse his convictions on both counts.

C. Terry Fool Bull.

Fool Bull was convicted of one count of "taking" a bald eagle in violation of the ESA, 16 U.S.C. §§ 1538 (a)(1)(B) and 1540(b)(1), and one count of offering for sale and selling a bald eagle in violation of the MBTA, 16 U.S.C. §§ 703 and 707. For reversal, he argues that the district court erred in: (1) allowing copies of the transcript of a tape recording to be furnished to the jurors in the jury room even though the parties had not stipulated to their accuracy or agreed to their use as evidence; (2) not instructing the jury that, to convict Fool Bull of "taking" a bald eagle, they must find that the eagle was alive at the time of the taking; (3) not setting aside the verdict and dismissing the indictment because of selective prosecution; and (4) not granting his motion for judgment of acquittal because the evidence presented at trial established as a matter of law that he was entrapped by government agents into taking and selling a bald eagle. Although we agree that Fool Bull's transcript claim may have merit under *United States v. McMillian*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975), we need not reach this

issue or the remaining issues because we agree that he was entrapped as a matter of law.

In our discussion of Lyle Dion's claim of entrapment, we set forth the standards governing a claim of entrapment. Fool Bull claims, without contradiction, that he had never killed or sold a protected bird or their parts before he was induced to do so in March of 1983 by direct and indirect government offers of a substantial amount of money over two years for a protected bird. He claims that he has never shot any bird or animal in the last five years, and has never owned a gun. He also notes that he has never been convicted of any crime, and has a good reputation as a law-abiding citizen. He was unemployed for much of the period of time when "Operation Eagle" was conducted, and he supports himself his family on $268 in assistance each month. He and his family live in a dilapidated trailer next door to his father-in-law, Asa Primeaux, Sr.

He claims that he first had contact with FWS agent Mauldin in 1981 when he observed Mauldin purchasing Indian crafts from several Indians and offering to buy any protected bird items the Indians could produce. He did not respond to Mauldin's offer at this time. In the late summer of 1982, he learned from Asa Primeaux, Jr. and Sr., that Mauldin and Standish were offering $750 for eagles. He claims that his father-in-law, Asa Primeaux, Sr., who was receiving several thousand dollars from the agents for protected birds and their parts, was acting as the unwitting agent of Mauldin and Standish by repeatedly encouraging him to be on the lookout for eagles or other protected birds.

Fool Bull claims that in early March, 1983, more than two years after "Operation Eagle" began, he

discovered an eagle which had been killed by a shotgun blast. Fool Bull alleges that he told his father-in-law, Asa Primeaux, Sr., about the eagle, and Asa encouraged him to sell it to agent Standish. Asa called Standish and told him that his son-in-law, Terry Fool Bull, had an eagle for sale. This was the first time that any FWS agent had heard anything about Fool Bull's involvement in the protected bird trade.

Shortly thereafter, Standish and Mauldin came to the residence of Asa Primeaux, Sr., who showed the agents a frozen eagle and offered it for sale. By this time, Fool Bull had arrived and Standish paid Fool Bull $650 for the eagle. This was the agents' only transaction with Fool Bull. The tape of this transaction reflects that Fool Bull had never sold a protected bird before and was quite naive as to the proper price for an eagle and what the "traders" would do with it.

In sum, Fool Bull claims that he was not predisposed to take or sell an eagle or other protected birds or their parts, that he was not ready and willing to do so whenever an opportunity arose, but that he was entrapped into taking and selling the eagle by Mauldin's direct offer of money for protected bird parts on one occasion and Mauldin's and Standish's repeated indirect offers of large sums of money for an eagle. The government contends that it did no more than offer Fool Bull an opportunity to commit the crime; otherwise, however, the government does not point to a single piece of evidence that Fool Bull was predisposed to commit the crime.

As we noted with respect to Lyle Dion, the fact that Fool Bull had never killed or sold an eagle before despite the market for these birds on the reservation (according to the government), reflects that he was not "ready and willing" to do so whenever a propiti-

ous opportunity arose. We are concerned that there is a great likelihood that Fool Bull was not predisposed to take or sell an eagle, but that his actions were completely the result of a government undercover operation which had carried on too long. By the spring of 1983, the government had conducted its undercover operation for over two years. It had started the operation with a good lead on which individuals in the Lake Andes area were killing and selling protected birds and their parts, and it quickly collected a substantial amount of evidence on these individuals and others who were engaging in this practice before the onset of "Operation Eagle." If the government wished to continue the operation for an additional two years, it had to take into account the risk that its offer of substantial sums of money to impoverished Indians for birds and bird parts might encourage the "unwary innocent," *Sherman*, 356 U.S. at 372, to take and sell protected birds. As we stated in *Lard*,

> [w]e recognize that the entrapment defense is a "relatively limited defense" and does not give the federal judiciary a "chancellor's foot" veto over those law enforcement practices with which it may not completely agree. *Russell*, 411 U.S. at 435. *Hampton*, 425 U.S. at 490. We also recognize that infiltration of criminal operations by undercover agents is an accepted and necessary practice, particularly in combatting an ever-expanding narcotics traffic. *See Hampton*, 425 U.S. at 495-96 n.6 (J. Powell, concurring); *see also Jannotti*, 673 F.2d 578 (undercover operations—including inducements—needed to discover and expose corruptible public officials.) However, the line must be drawn where, as here,

> a government agent lures the unwary innocent and then implants a law-breaking disposition that was not theretofore present. In such cases, the government takes on the unwholesome appearance of the consummate manufacturer of crime. The continuing vitality and integrity of our "government of laws" would be imperiled if we sanctioned the manufacturing of crime by those responsible for upholding and enforcing the law. As Mr. Justice Frankfurter stated in *Sherman*, 356 U.S. at 384: "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."

Id., slip op. at 11-12.

Viewing the evidence in the light most favorable to the government, we conclude that the evidence shows that Fool Bull was entrapped as a matter of law. No reasonable jury could have found beyond a reasonable doubt that Fool Bull was ready and willing to commit the crimes, and that the agents did no more than afford him an opportunity to do so. We therefore reverse Fool Bull's convictions on both Counts I and II of the indictment.

D. Asa Primeaux, Sr.

As Primeaux, Sr., was convicted of eight counts of violating the BGEA, 16 U.S.C. § 668(a) (the MBTA, 16 U.S.C. §§ 703 and 707, and the ESA, 16 U.S.C.

§§ 1538(a)(1)(B) and 1540(b)(1). For reversal, Primeaux contends: [15] (1) that the trial court's denial of his motion for a continuance violated his sixth amendment right to effective assistance of counsel; (2) that his sixth amendment right to an impartial jury was violated because a majority of the veniremen had previously set as potential jurors in similar prose-

[15] Primeaux claimed at his trial that he had been entrapped. He does not, however, raise this claim on appeal. In light of our disposition of the entrapment claims of Lyle Dion and Terry Fool Bull, we have also reviewed Primeaux's claim of entrapment. We find that Primeaux does not have a claim of entrapment as a matter of law. His case is distinguishable from the cases of Lyle Dion and Terry Fool Bull on several grounds. Primeaux, unlike Dion and Fool Bull, became involved in "Operation Eagle" very early on. On the first day that agent Mauldin arrived in South Dakota, Primeaux sold to Mauldin Indian fans made from protected bird feathers. Over the next two years, Primeaux, on several occasions, sold to Mauldin protected bird parts or the birds themselves.

Like Fool Bull and Dion, Primeaux claimed that because he was very poor, he could not resist the government's offer of large sums of money for protected bird feathers. This is not enough to make out a claim of entrapment. Unlike the situation in the cases of Dion and Fool Bull, in Primeaux's case, "Operation Eagle" quickly led to him as an individual who was involved in making crafts from protected bird feathers, and possibly involved in selling these items commercially. There was no evidence of predisposition in the cases of Dion and Fool Bull, but at least some evidence of predisposition in Primeaux's case. We are not troubled in Primeaux's case, as we are in Dion's case and Fool Bull's case, that the crimes committed were purely the result of the "creative activity" of the government, or that Primeaux was an "unwary innocent" entraped into committing a crime by an undercover operation which offered too much money to impoverished Indians over too long a period of time, such that persons who would otherwise have obeyed the law were eventually enticed into breaking it.

cutions under "Operation Eagle"; (3) that his sixth amendment right to an impartial jury was violated because the trial court on voir dire refused to permit counsel's questions on the bias of the veniremen toward the offenses charged and the defense of entrapment. We find that these claims lack merit and we affirm Primeaux's convictions on all eight counts.

We do not agree with Primeaux's first claim that he was denied effective assistance of counsel because the trial court denied his motion for a continuance made six days before trial. The record reveals that Primeaux's counsel, John N. Gridley, had more than three months to investigate and prepare for trial, and reveals that during this time, Gridley investigated the law and facts of the case and filed sixteen pretrial motions, including two motions for continuance, the first of which was granted. Six days before trial, Gridley filed the second motion for continuance on the ground Primeaux wished to use a new volunteer counsel, who needed additional time to prepare. The court denied the motion.

Primeaux's argument on appeal relies on two cases. First, he cites *Powell v. Alabama*, 287 U.S. 45 (1932), for the proposition that a "defendant should be afforded a fair opportunity to secure counsel of his own choice." *Id.*, 77 L.Ed. at 162. We agree with this statement of the law, but the record reveals that Primeaux did have a fair opportunity to secure counsel of his choice. Gridley acted as counsel for three months, and Primeaux expressed no dissatisfaction with his services. Indeed, Gridley is counsel for Primeaux on this appeal.

Primeaux next cites *Wolf v. Britton*, 509 F.2d 304 (8th Cir. 1975), for the proposition that defense counsel must be given a fair opportunity to prepare

his case. In that case, we found a denial of effective assistance of counsel where the initial appointment of defense counsel was made one and one-half days before the commencement of trial. This is a far cry from the case at hand, where the initial appointment of defense counsel was made well over three months before trial and where the defendant received one continuance and then first expressed a desire for new counsel six days before trial.

Finally, to prove that he was denied effective assistance of counsel, a defendant must prove that

> counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 80 L.Ed.2d 674, 693 (1984).

Primeaux has not met this standard. He gives no indication what his counsel was unable to do at trial that a continuance would have allowed him to do. The record reveals that Primeaux was ably represented at trial, and was only convicted of eight counts on the fourteen-count indictment. We find no abuse of discretion in the district court's denial of the motion for continuance and no violation of Primeaux's sixth amendment right to effective assistance of counsel.

Primeaux's second argument for reversal is that he was denied his sixth amendment right to a fair and impartial jury because the jury panel from which his petit jury was selected consisted of veniremen who had sat as potential jurors in other prosecutions arising out of "Operation Eagle." However, the record reveals that any and all of the potential jurors called for this case who had actually sat on prior "Operation Eagle" juries were excused and released by the trial court.

Primeaux's claim fails because the mere selection of jurors from panels who may have previously participated in voir dire, even in a similar case, is not error, *United States v. Williams*, 484 F.2d 176, 178 (8th Cir.), *cert. denied*, 414 U.S. 1070 (1973); *United States v. Jones*, 486 F.2d 476, 477-78 (8th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974), unless actual bias is shown. *United States v. Franklin*, 700 F.2d 1241, 1242 (10th Cir. 1983).

The cases cited by Primeaux are inapposite. In *Leonard v. United States*, 378 U.S. 544 (1964), the Court reversed defendant's conviction where jurors had sat in open court and listened to another jury return a guilty verdict against the same defendant whom they then proceeded to try on charges almost identical to those on which they had seen him convicted. In *Everett v. United States*, 281 F.2d 429, 438 (5th Cir. 1960), the Court found reversible error where the trial court allowed eight of the jurors who had served as jurors in a codefendant's case, and who had been complimented by the court for their promptness in returning guilty verdicts, to sit on the defendant's case. In *Lett v. United States*, 15 F.2d

690 (8th Cir. 1926), the Court ordered a new trial where eight members of Lett's jury were jurors on the panel which convicted Lett's wife that same day.

In Primeaux's case, all of the potential jurors seated for voir dire were asked if they knew the defendant or had ever heard his name before. Only one responded positively and was excused. The potential jurors were also asked whether they had heard of "Operation Eagle" and whether this would influence them. All jurors who responded that they would be influenced by what they heard or thought about the case were excused for cause. The jurors were further questioned by defense counsel whether they had formed any opinion about the defendant or any of the other cases they had been questioned about and they gave negative responses. In sum, we find no error because Primeaux has failed to show that any of the petit jurors in his case were in any way biased.

Primeaux's final argument for reversal is that his sixth amendment right to an impartial jury was violated because the court refused to allow questions on voir dire designed to elicit bias of veniremen toward the offenses charged or the defense of entrapment. The general rule is that, while a district judge should allow a lawyer a full opportunity to question jurors about how factors which will be revealed by the evidence will influence them,[16] a district judge has substantial discretion in determining the form and scope of voir dire, Fed. R. Crim. P. 24(a); *Rosales-Lopez v. United States*, 451 U.S. 187, 188-89 (1981); *United States v. Cassell*, 668 F.2d 969 (8th Cir.), *cert. denied*, 457 U.S. 1132 (1982), and will be reversed only for an abuse of discretion and where substantial prejudice to the defendant is created. *Id.*, at 971; *United States v. Drefke*, 707 F.2d 978 (8th Cir.), *cert. denied*, 104 S. Ct. 359 (1983).

[16] Additionally, as the Supreme Court recently noted:

> "We reiterate what this Court stressed in *Dennis v. United States*, 339 U.S. 162, 168 (1950): "[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its ruling on challenges therefor. * * * In exercising its discretion, the trial court must be zealous to protect the rights of an accused."

Wainwright v. Witt, —— U.S. ——, 83 L.Ed.2d 841, 855 (1985).

The trial court allowed extensive voir dire in this case. The court's questioning covers eighteen pages of the trial transcript, the government's questioning covers twelve pages, and the defendant's questioning covers 71 pages. Having reviewed these pages of transcript and the arguments of the parties, we find that the court allowed adequate voir dire. If we were sitting as a trial court, we might have allowed additional questioning by the defendant, but we cannot agree that the trial court abused its discretion or that Primeaux has suffered substantial prejudice. Accordingly, we affirm Primeaux's convictions on all eight counts.

II. CONCLUSION

First, with respect to Dwight Dion, Sr., we affirm his convictions on Counts III, IV, V, VI, IX, XI, XIII and XIV. We also find no error under the allegations of error before this panel with respect to Counts VIII and X; however, these counts are vacated pursuant to the opinion of this Court *en banc*. Count XII against Dion is not before this panel; the Court *en banc* affirmed the trial court's dismissal of this count.

Second, with respect to Lyle Dion, we reverse his convictions on both Counts I and II of the indictment. Accordingly, this Court's *en banc* opinion, va-

cating Count I of the indictment on the treaty defense, is of no effect because we reverse Dion's conviction on Count I outright.

Third, with respect to Terry Fool Bull, we reverse his convictions on both Counts I and II of the indictment.

Finally, we affirm the convictions of Asa Primeaux, Sr., on Counts I, IV, V, VI, VII, VIII, XI and XIV of the indictment.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 83-2353SD

UNITED STATES OF AMERICA, APPELLANT

v.

DWIGHT DION, SR., APPELLEE

[Filed May 20, 1985]

Appeal from the United States District Court
for the District of South Dakota

SUPPLEMENTAL JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel before a panel of this Court and subsequently on specified issues only to the Court en banc for determination.

After consideration of the premises including the Court's en banc opinion of January 9, 1985 it is

further adjudged and decreed that the convictions of Dwight Dion, Sr. on Counts III, IV, V, VI, IX, XI, XIII and XIV are affirmed. Counts VII and X have been vacated pursuant to the opinion of this Court en banc; the Court en banc affirmed the trial court's dismissal of Count XII.

The convictions of Lyle Dion on both Counts I and II of the indictment are reversed. Because Lyle Dion's conviction on Count I is reversed outright the vacation of Count I of the indictment on the treaty defense by the Court's *en banc* opinion has no effect.

The convictions of Terry Fool Bull on both Counts I and II of the indictment are hereby reversed.

The convictions of Asa Primeaux, Sr. on Counts I, IV, V, VI, VII, VIII, XI and XIV of the indictment are affirmed.

May 20, 1985

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CR83-40025-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

DWIGHT DION, SR., DEFENDANT

[Filed Sept. 8, 1983]

MEMORANDUM OPINION AND
ORDER ON MOTIONS

Defendant Dwight Dion, Sr. is charged in Counts 1, 3, 5, and 12 with violations of the Bald and Golden Eagle Act (BGEA) 16 U.S.C. § 668(a); in Counts 2, 4, 6, 9, 11, 13, and 14 with sale of all or parts of migratory birds in violation of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 and 707; and in Counts 8 and 10 with the taking of Bald Eagles in violation of the Endangered Species Act (ESA), 16 U.S.C. §§ 1538 and 1540.

An evidentiary hearing on all pending motions was commenced on September 2, 1983, with the plaintiff appearing by Bonnie P. Ulrich, and with the defend-

ant appearing by his attorney, Michael Dow, and the defendant waived his right to be present; and the hearing was concluded on September 6, 1983, with the same appearance by counsel and with the defendant personally appearing for the hearing.

1. RELIGION

The defendant in his Motion for Dismissal, § I asserts that the ESA, BGEA and MBTA statutes are unconstitutional restrictions on his religious practices, and the plaintiff by its Motion in Limine seeks to exclude from the trial evidence of the defendant's religious beliefs. It is clear from the record herein that the possession and transportation of eagle feathers and parts of eagles are integral parts of the Indian religious practices. The charges against the defendant relate to the taking and sale of eagles, or other migrating birds or parts thereof, and I conclude that the prohibition of these practices does not violate the defendant's religious rights. Indians can acquire eagle and eagle parts for religious purposes from the Pocatello Supply Depot in Pocatello, Idaho by paying transportation costs. While there is some delay between the making of an order and receipt of the eagle or parts, I conclude that it is reasonable, and that it is therefore not necessary for Indians to take eagles in violation of ESA or MBTA in order to practice their religion. The defendant's motion to dismiss on religious grounds must be denied. I conclude that the plaintiff's Motion in Limine may be too broad, notwithstanding my finding herein that ESA, BGEA and MBTA are constitutional as applied to this case. Plaintiff's Motion in Limine will be denied, although I will make evidentiary rulings herein consistent with this opinion.

2. TREATY RIGHTS

The defendant in his Motion for Dismissal, § II asserts that ESA, BGEA and MBTA violate defendant's treaty rights, relying principally on *United States v. White*, 508 F.2d 453 (8th Cir. 1974). Notwithstanding criticism of *White*, it remains the law in this circuit. All counts in the indictment can be distinguished from the factual situation in *White* except for Count 12. Count 12 charges the taking of a Golden Eagle in violation of BGEA. The undisputed evidence is that the taking was on the Yankton Sioux Reservation. I conclude that Count 12 must be dismissed under the holding of *White*.

Counts 8 and 10 charge a taking of Bald Eagles under ESA, and I conclude that Congress intended to abrogate treaty hunting rights as to endangered species. Hunting rights as to Bald Eagles would have no value if Bald Eagles became extinct.

Counts 2, 4, 6, 9, 11, 13, and 14 charge a sale of migratory birds or parts thereof in violation of MBTA, and Counts 1, 3, and 5 charges a sale of parts of a Bald Eagle in violation of BGEA, and they are also distinguishable from *White*. Even if MBTA and BGEA did not abrogate the treaty right to hunt migratory birds on the reservation, they could properly prohibit the commercial sale of migratory birds or Bald Eagles or their parts.

In summary, I conclude that, under *White*, defendant's treaty rights are not abrogated by BGEA insofar as hunting is concerned. However, defendant does not have the right to sell eagles or other migratory birds, or their parts in violation of MBTA, nor does he have the right to take Bald Eagles in violation of ESA.

Defendant's Motion for Dismissal on this ground will be granted as to Count 12, and denied as to all other counts. The plaintiff's Motion in Limine to exclude evidence of treaty rights should be granted.

3. RECORDED CONVERSATIONS

Plaintiff seeks to have a number of recorded conversations admitted into evidence: (a) December 7, 1982 with Nando Mauldin, Exhibit 13; (b) December 13, 1983, Exhibit 14; (c) December 7, 1982 with Robert Standish, Exhibit 15; (d) December 7, 1982 with Robert Standish, Exhibit 16; and (e) March 10, 1983, Exhibit 17.

I conclude that these conversations should be admitted into evidence in this case.

4. OTHER MOTIONS

I have reviewed the other motions made by the defendants, and the briefs of counsel, and conclude that the motions should be denied.

Now, therefore, —

IT IS ORDERED:

(1) That Count 12 of the indictment is hereby dismissed.

(2) That the defendant's Motion for Dismissal, based upon religion, treaty rights, entrapment, unlawful delegation of legislative authority to the executive, equal protection, and delay in prosecution, is denied as to all other counts.

(3) That the plaintiff's Motion for Admission of Tape Recordings relating to Exhibits 13, 14, 15, 16, and 17 is granted, and those exhibits shall be received in evidence, and the written transcripts thereof, Exhibits 13A, 14A, 15A, 16A, and 17A, may

be furnished jurors for their assistance in listening to the recordings while they are played in open court.

Dated this 8th day of September, 1983.

BY THE COURT:

/s/ John B. Jones
United States District Judge

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OPPOSITION

BRIEF

EDITOR'S NOTE

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No. ~~A-11~~

In the Supreme Court of the United States

October Term, 1985

85-246

United States of America, Petitioner

v.

Dwight Dion, Sr., Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

October Term, 1985

No. All

United States of America, Petitioner

v.

Dwight Dion, Sr., Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dwight Dion, Sr., hereby responds to the petition of the Solicitor General for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

Respondent accepts Petitioner's statement of the opinions below.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

STATUTES INVOLVED

Respondent accepts Petitioner's exposition of the federal statutes involved in this proceeding.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case for purposes of this brief in opposition to the government's petition for certiorari.

REASONS FOR DENYING THE PETITION

The court below, applying principles of construction developed for the purpose of interpreting Indian treaties, correctly interpreted this court's decisions in concluding that the 1858 Treaty with the Yankton Sioux Tribe reserves to that tribe the right to hunt eagles on the reservation.

Furthermore, the court below was correct in concluding that the traditional hunting rights of the Yankton Sioux have not been abrogated by the Bald and Golden Eagle Act, (BGEA), or the Endangered Species Act, (ESA).

(I)

Unique principles of construction have been developed to interpret the language contained in Indian treaties. These principles have been applied because of the United States' "superior negotiating skills and superior knowledge of the language in which ... treaties were recorded." Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658, 675-76 (1979). That a treaty is to be construed as the Indians would have understood it, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970), is central to these principles of construction.

Applying these principles of construction, it is clear

that a specific reservation of on reservation hunting rights is not necessary to establish such rights. As stated in F. Cohen, Handbook of Federal Indian Law, 496-97, (2d ed. 1958),

> ...such a reservation was not necessary to preserve the right on the lands reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed' remained in them unless granted away. United States v. Winans, 198 U.S. 371, 381 (1905).

Thus, in light of the above outlined traditional and legal recognition of the American Indians' right to hunt on their own lands, it can only be concluded that the Yankton Sioux Indians would understand the 1858 treaty as reserving in them the right to hunt eagles on their reservation.

(II)

Nowhere in the statutory language or the legislative history of the BGEA does one find an express statement that Indian treaty rights were to be abrogated, extinguished, suspended, or modified. United States v. Fryberg, 622 F.2d 1010 at 1013. Nor is there in the ESA or its legislative history any express reference to Indian treaty hunting rights showing a Congressional intent to abrogate or suspend such hunting rights.

The government argues that Congress' rejection of a bill which would have specifically exempted American Indians from the prohibitions of the ESA exhibits an intent on the part of Congress to abrogate treaty hunting rights. Such a "backhanded" way of imposing criminal penalties for acts protected by a solemnly executed treaty cannot be attributed to Congress. If Congress had desired to abrogate treaty hunting rights, it had to do no more than say so directly.

With regard to the BGEA, the government argues that the creation of authority in the Secretary of the Interior to per-

mit the taking of eagles for religious purposes indicates a Congressional intent to abrogate Indian treaty rights. However, the religious purposes exception is not limited to the taking of eagles by Indians or the taking of eagles on the reservation. Congress could just as easily have deemed it necessary to permit non-Indians to hunt eagles for the religious purposes of Indians, either on or off the reservation.

In this same vein, the only possible indication of Congressional intent to abrogate husting rights in the ESA is Congress' rejection of the bill specifically excepting Indians from the Act. The government argues that Congressional rejection of this version of the act shows Congress' intent that Indians be subject to the Act's prohibitions. It is however just as plausible, if not more so, that Congress concluded that American Indians are protected sufficiently from operation of the Act by virtue of their solemn treaty rights which have been the law of the land for more than one hundred years.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

Michael H. Dow
Attorney for Respondent

September, 1985

JOINT

APPENDIX

Supreme Court, U.S.
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No. 85-246

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

DWIGHT DION, SR.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED OCTOBER 15, 1985

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RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

UNITED STATES OF AMERICA
v.
DWIGHT DION, SR.
Cr. No. 83-40025-01

DATE	DESCRIPTION
5/18/83	Indictment.
7/19/83	Motion by defendant for dismissal and evidentiary hearing.
7/26/83	Response by government to motion for dismissal and evidentiary hearing.
9/ 2/83	Hearing on Government's motion for pretrial hearing including defendants' motions to dismiss on religious grounds and motions to dismiss on treaty grounds.
9/ 6/83	Continuance of hearing on evidentiary matters including defendants' motions to dismiss on religious grounds and motions to dismiss on treaty grounds.
9/ 8/83	Memorandum opinion and order dismissing Count 12 of the indictment; denying defendant's motion for dismissal based upon religion, treaty rights, entrapment, unlawful delegation of legislative authority, equal protection and delay in prosecution; granting plaintiff's motion for admission of tape recordings.
9/20/83	Jury trial commences.
9/22/83	Verdict of Guilty on Counts 3, 4, 5, 6, 8, 9, 10, 11, 13, 14.
10/ 7/83	Notice of Appeal by United States of America from order of 9/8/83 dismissing Count 12 of indictment.

11/ 7/83	Judgment and Commitment/Probation Order.
11/10/83	Notice of Appeal by Dwight Dion, Sr., from judgment of 11/7/83.

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

DWIGHT DION, SR., Appellee,
No. 83-2353-SD

UNITED STATES OF AMERICA, Appellee,

v.

DWIGHT DION, SR., Appellant No. 83-2538-SD

DATE	DESCRIPTION
10/12/83	Docketed Government's appeal in No. 83-2353-SD.
11/17/83	Docketed Dwight Dion, Sr.'s appeal in No. 83-2538-SD and consolidated with No. 83-2353-SD.
4/ 3/84	Motion of United States for hearing *en banc* in Nos. 83-2353, 83-2538, 83-2543, 83-2544 and 83-2521.
4/24/84	Motion of United States for a hearing *en banc* is denied.
6/11/84	Argued and submitted before Judges Heaney, John Gibson, and Fagg.
6/28/84	Order: Upon review the panel voted to transfer the stated issues to the Court *en banc* for consideration.
9/13/84	Argued and submitted to Judges Heaney, Bright, Ross, McMillian, Arnold, Gibson, Fagg, and Bowman.
1/ 9/85	Opinion by Ross, published; dissent by McMillian joined by Bright and Fagg (752 F.2d 1261).

1/ 9/85 Judgment: It is adjudged and decreed that the dismissal of count 12 against Dwight Dion, Sr. is affirmed; the convictions on counts 8 and 10 against Dwight Dion, Sr. and on count 1 against Lyle Dion are vacated. The government may retry defendant Dwight Dion, Sr. on counts 8 and 10 and defendant Lyle Dion on count 1. However, upon any retrial on these counts the jury must determine under proper instructions whether the defendants are members of the Yankton Sioux Tribe, whether the takings occurred on the Yankton Sioux Reservation, whether or not the takings were for commercial purposes. It is further adjudged that the defendants have no treaty right to sell parts and carcasses of eagles or scissor-tailed flycatchers commercially. The district court's refusal to dismiss counts 3, 4, 5, 6, 9, 11, 13 and 14 of the indictment against Dwight Dion, Sr. and count 2 of the indictment against Lyle Dion, which counts charged the defendants with selling parts and carcasses of the birds is hereby affirmed. The cause is remanded to a panel of this court for a determination of the nontreaty defenses raised on this appeal.

1/29/85 United States' motion to recall judgment and to stay issuance of mandate.

2/28/85 Order: United States' motion to recall the judgment and stay the mandate is granted and the judgment entered 1/9/85 is set aside and withdrawn until such time as the three-judge panel issues its opinion on the remaining issues in these appeals. The mandate shall not issue until 21 days after entry of judgment on the panel opinion.

5/20/85 Opinion by Heaney, published (762 F.2d 674).

5/20/85 Judgment: Upon consideration of the Court's *en banc* opinion of 1/9/85 it is further adjudged and decreed that the convictions of Dwight Dion, Sr. on Counts III, IV, V, VI, IX, XI, XII [sic] & XIV are affirmed. Counts VIII & X have been vacated pursuant to the opinion of this Court *en banc*; the Court *en banc* affirmed the trial court's dismissal of Count XII. The convictions of Lyle Dion on both Counts I & II of the indictment are reversed. Because Lyle Dion's conviction on Count I is reversed outright, the vacation of Count I of the indictment on the treaty defense by the Court's en banc opinion has no effect. The convictions of Terry Fool Bull on both Counts I and II of the indictment are hereby reversed. The convictions of Asa Primeaux, Sr. on Counts I, IV, V, VI, VII, VIII, XI & XIV of the indictment are affirmed.

6/ 4/85 Motion of United States for extension of time to file petition for rehearing or rehearing *en banc* granted to and including 7/3/85.

7/ 3/85 Petition for rehearing or rehearing *en banc* (by United States).

8/20/85 Order: Petition for rehearing en banc submitted by the United States of America has been considered by the Court and is denied. Petition for rehearing by the panel is also denied.

8/26/85 Notice of filing of petition for writ of certiorari to Supreme Court as Case No. 85-246, dated August 13, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CR 83-40025-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

DWIGHT DION, SR.,
VIOLA DION, DEFENDANTS

INDICTMENT

(16 U.S.C. § 668(a); 16 U.S.C. § 703 & § 707; 16 U.S.C. § 1538(a)(1)(B) & § 1540(b)(1)

Bald & Golden Eagle Act; Migratory Bird Treaty Act; Endangered Species Act.

The Grand Jury Charges:

COUNT I

On or about the 25th day of February, 1981, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so, did knowingly offer to sell and sell parts of a Bald Eagle, to wit, feathers in the form of a fan, in violation of 16 U.S.C. § 668(a).

COUNT II

On or about the 25th day of February, 1981, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully offer for sale and sell parts of a migratory bird, to wit: feathers of a Rough-legged Hawk in the form of a fan, in violation of 16 U.S.C. § 703 and § 707.

COUNT III

On or about the 25th day of February, 1981, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so, did knowingly offer to sell parts of a Bald Eagle, that is, feathers in the form of a fan, in violation of 16 U.S.C. § 668(a).

COUNT IV

On or about the 25th day of February, 1981, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully offer for sale parts of a migratory bird, to wit: feathers of a Scissor-tailed Flycatcher in the form of a fan, in violation of 16 U.S.C. § 703 and § 707.

COUNT V

On or about the 27th day of October, 1981, in the District of South Dakota, Dwight Dion, Sr. and Viola Dion, without being permitted to do so, did knowingly offer to sell and sell and barter and aid and abet in the sale and barter parts of a Bald Eagle in the form of a fan, in violation of 16 U.S.C. § 668(a)..

COUNT VI

On or about the 27th day of October, 1981, in the District of South Dakota, Dwight Dion, Sr. and Viola Dion, without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully offer for sale and sell and barter and aid and abet in the sale and barter, parts of a migratory bird, to wit, feathers of a Scissor-tailed Flycatcher in the form of a fan, in violation of 16 U.S.C. § 703 and § 707.

COUNT VII

On or about the 7th day of August, 1982, in the District of South Dakota, Viola Dion, without being permitted to

do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully offer for sale and sell parts of a migratory bird, to wit: feathers of a Rough-legged Hawk in the form of a fan, in violation of 16 U.S.C. § 703 and § 707.

COUNT VIII

On or about the 6th day of December, 1982, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so, did knowingly take, within the United States, endangered species, to wit, three (3) Bald Eagles, in violation of 16 U.S.C. § 1538(a)(1)(B) and § 1540(b)(1).

COUNT IX

On or about the 13th day of December, 1982, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully sell migratory birds, to wit: four (4) Bald Eagles, in violation of 16 U.S.C. § 703 and § 707.

COUNT X

On or about the 6th day of January, 1983, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so, did knowingly take, within the United States, endangered species, to wit: one (1) Bald Eagle, in violation of 16 U.S.C. § 1538(a)(1)(B) and § 1540(b)(1).

COUNT XI

On or about the 7th day of January, 1983, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully sell a migratory bird, to wit: a Bald Eagle, in violation of 16 U.S.C. § 703 and § 707.

COUNT XII

On or about the 6th day of January, 1983, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so, did knowingly take a Golden Eagle, in violation of 16 U.S.C. § 668(a).

COUNT XIII

On or about the 7th day of January, 1983, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully sell a migratory bird, to wit: a Golden Eagle, in violation of 16 U.S.C. § 703 and § 707.

COUNT XIV

On or about the 10th day of March, 1983, in the District of South Dakota, Dwight Dion, Sr., without being permitted to do so by any regulation made, adopted and approved under the authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did unlawfully sell migratory birds, to wit: two (2) Bald Eagles, in violation of 16 U.S.C. § 703 and § 707.

A TRUE BILL:

MELVIN H. LEWIS
Foreman

PHILIP N. HOGEN
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Docket No. 83-40025-01
Sioux Falls, South Dakota
September 2, 1983
and
September 6, 1983
VOLUME II

UNITED STATES OF AMERICA, PLAINTIFF,

v.

DWIGHT DION SR., DEFENDANT.

Docket No. 83-40024

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LYLE DION, DEFENDANT.

Docket No. 83-40028

UNITED STATES OF AMERICA, PLAINTIFF,

v.

TERRY FOOL BULL, DEFENDANT.

Docket No. 83-40027

UNITED STATES OF AMERICA, PLAINTIFF,

v.

NEULON DION, DEFENDANT.

TESTIMONY OF DOUGLAS LONG

* * * * *

[8] Q. I will show you what has been marked as Government Exhibit Number 1, Mr. Long. Can you identify that exhibit?

A. Yes. These are the bylaws of the Native American Church of North America.

Q. When were those bylaws adopted by the church?

A. These bylaws were adopted by the church on August 11th, 1918, in El Reno, Oklahoma.

Q. Were they adopted as they are right now?

A. No. There has been amendments and one of the times when amendments were made was in 1944 and also in 1955.

Q. I would ask you to look through those until you come to Article 11 of the bylaws.

(Witness complies)

Q. Do you know when that was added to the bylaws?

A. Article 11, as far as I know, has been adopted since 1965.

Q. And what does Article 11 of the bylaws of the Native American Church state?

A. "Section 1. Native American Church of North America philosophy be and remain [sic] that it looks with disfavor on the practice of the pawn and sale of religious prayer instruments, such activity is disgraceful to our way of [9] worship."

Q. Would religious prayer instruments include feathered fans?

A. Yes.

Q. Would they include fans made of rough-legged hawk feathers?

A. Yes.

Q. Would they include fans made from bald eagle feathers?

A. Yes.

Q. Would they include fans made from the feathers of a scissor-tail fly-catcher?

A. Yes.

Q. Would they also include feathers from a red-tail hawk used in a fan?

A. Yes.

Q. Would they also include fans made from the feathers of an anhinga?

A. Yes.

Q. Now, are the bald and golden eagles looked upon as sacred birds by the Native American Church of North America?

A. Yes.

Q. What is the history or how does the eagle play that sacred role within the church and within Indian beliefs? What makes the eagle sacred to the Indian?

A. This would vary with various tribes here in the United States. But, speaking for the Winnebago Tribe of Indians [10] located in Wisconsin and also in Nebraska, our history, which is oral, tells us that the eagle is one of the fowl that has been created by the Creator God and it is the only member of the fowl that can fly to—they say that there are four atmospheres that our elders spoke about and the eagle can fly in the region where the Creator God resides. For this reason the use of eagle feathers in our religious ceremonies are held in high honor and respect.

Q. Would this be true, although the origin of the sacredness of the eagle may differ from tribe to tribe, is the eagle held with respect and as a sacred bird by all of the Indians in North America?

A. Yes.

Q. Is the Native American Church also opposed to the killing of eagles or the sale to non-Indians?

A. Yes.

* * * *

[16] Q. Mr. Long, I believe you testified that—well, can you tell me who makes these Indian prayer instruments?

A. Various Indian people are gifted in many ways. Now, I myself am not one of the people that has the patience or has the gift of creating various types of beadwork like, for instance, the medallion that I am wearing. You know, I couldn't begin to make something on this order. And, also, as far as the making or the preparation of the various fans that are used in the Native American Church services, there are certain men who are gifted in that type of handicraft. So, these gentlemen would be asked to prepare such a fan.

Q. Is a fan the only thing that can be called a prayer [17] instrument?

A. No. There are various instruments. Like we have a staff and we also have a gourd and we have other prayer instruments that are used. And these are prepared by men that are—it is something that is handed down from generation to generation like, for instance, the eagle-bone whistle. Now, that is another item that in my personal life I have never prepared an eagle-bone whistle and there are only certain people that can do that.

Q. Okay. Let me ask you this: What particular prayer instruments would require feathers and beadwork?

A. Well, actually, the prayer feathers that I use, to begin with, they were used just as they are natural. But, being that some people acquired the ability to decorate these various feathers, that has come about and it is just something that has happened within, say, the last 50 years.

Q. Is there a prayer instrument known as a fan that is used in the Native American Church?

A. Yes.

Q. And what elements does a fan contain?

A. First of all, it will contain the feather and then it will take buckskin and beadwork and the only way I can describe the handle would be that it is made out of wood and it would be solid and then there is buckskin fringes [18] that are put on the bottom of it.

Q. Are these fans usually made by craftsmen?

A. Yes.

Q. Does it take a fair amount of skill to create one of these fans?

A. Yes, it does.

Q. Does it take a pretty good amount of time to create a fan?

A. Yes.

Q. And with regard to the whole Indian population, are there only a few people that are capable of making prayer instruments like a fan?

A. Speaking from the point of view of the Native American Church, I only know just a very few. Maybe just five or six people at the most.

Q. How long do you think it takes to make a prayer instrument like a fan?

A. It will take probably one month.

Q. Of, what, eight hours a day?

A. Yes. Maybe ten or twelve hours a day. As long as the light is bright.

Q. To make one fan?

A. Yes.

Q. And there are only a few people in the church that make fans, is that correct?

A. Yes. Right.

[19] Q. So, these few people have to make all the fans for everyone else in the church that needs one, is that correct?

A. Well, various people might know more craftsmen than I do. But, going from the people that I know, you know, I would say about five or six people.

Q. So, are we to assume from your testimony that these certain individuals who make fans, say, eight hours a day and it takes them thirty days to make a fan, are we to assume that those people receive no compensation for their work on those fans with the feathers?

A. Depending on the area in which you live. Like, I come from Wisconsin and one of the main staples that we survive on is corn and wild rice and venison. So, in exchange for one of—for one of my friends or one of my relatives to perform this work for me, I may, in exchange, give them some dried sweetcorn or some dried wild rice or, if it is in season, you know, I would present them with some venison.

Q. So, you might barter for the creation of a fan then, is that correct?

A. Yes. That is permissible.

Q. How about payment in monetary terms? Is that permissible? If there is nothing to barter, wouldn't that be the only way to pay for a fan?

[20] A. Yes.

Q. So, payment with money is permissible in some instances in the Native American Church for prayer instruments, is that correct?

A. For the time and effort that a craftsman would put into creating a fan.

Q. So, it is sometimes permissible, is that correct?

A. Yes.

MR. DOW: I have nothing further, Your Honor.

* * * * *

[24] Q. The religious practices of the Native American Indians go back long before the establishment of this corporation that we're talking about here, is that a fair statement?

A. Yes.

Q. Now, you indicated in direct examination that redtail hawks, anhingas, bald or golden eagles, play a part in the practices of the Native American Indian Church and I assume in the practices of the Native American religion, is that a fair statement?

A. Yes.

Q. And that these birds, particularly the eagles, hold some position of sacredness in the religious framework of the church and the religion, is that your testimony?

A. Yes.

[25] Q. Do you know of any provision that prevents me from adopting as my own personal religion the practices of the Native American Indian Church or the Native American religion, even though I am 100 percent white man?

A. Restate that question again, please.

Q. The question which I'm asking you is do you know of anything that prevents me, as a 100 percent white man, without any Indian blood in me whatsoever, from adopting the practices, the religious practices, of the Native American Indian Church or at least of the Native American Indian religion?

A. If, in speaking on behalf of the Native American Church, if your spouse should be a member of an Indian tribe with 25 percent blood quantum, you would be eligible to participate in our church services.

Q. Here's the question which I'm asking you: Do you agree that it is a matter of my own independent religious belief and thought which directs which religious practice I'm going to follow? Would you agree with that?

A. Yes.

Q. And I'm asking you if you would also agree it is possible that, as a white man, I could practice the Native American religion, leave out the Native American [26] Church now, the Native American religion and I have done nothing wrong? Would you agree with that?

A. Yes.

Q. Now, if that is true, what would be wrong with my acquiring paraphernalia or religious instruments to pursue that religion?

A. Being that I am only a member of the Native American Church and I am not a traditional Indian and I

am not a follower of other Indian religions, I don't think I can answer your question.

* * * * *

TESTIMONY OF VERNON ASHLEY

* * * * *

[39] Q. Did your father practice healing within the Indian traditional way?

A. Yes. I knew of some instances where he did.

Q. Have you, during your 68 years, talked with other Indian people and traditional Indian people concerning traditional Indian religion and religious beliefs?

A. Well, not specifically. But, I have had the occasion of talking to the elder members of our tribe.

Q. And through the older members of your tribe do you have information as to what position the eagle holds among the Indian people, the Sioux Indian people in South Dakota?

A. Well, as I tell you, I can only go back 68 years. But, in my association with the tribe and elder members of the tribe I am told that the eagle was held in high regard.

Q. Have you ever heard through, again your association with those elders, of an eagle being killed for food?

A. Never.

Q. And what about of anyone intentionally killing an eagle?

A. Never heard of that either.

* * * * *

TESTIMONY OF BEN BLACK BEAR, JR.

* * * * *

[48] Q. And what is the role of the eagle?

A. Well, I have learned of the significance and importance of the eagle as a sacred object, used in religious ceremonies. Parts of eagles are used directly, for example, with like the eagle-bone whistle that was [49] mentioned as an inseparable part of like the sun dance ceremony. It has to be used there.

Q. Is the eagle considered sacred among Indians?

A. Yes. I would say the eagle is considered sacred.

Q. Are you aware, through your experience, both your teaching and your life experiences, of the traditional methods of catching eagles?

A. Yes. It was explained to me the way that eagles were captured.

Q. And who explained this to you?

A. My mother and my father explained different stories of how this was done. My grandmother also explained it to me, of actual incidents.

Q. And how was this done?

A. I was told that eagles were captured by setting up a—digging a pit and setting up a trap for them and the individual who went out to capture the eagle usually prepared himself ahead of time, you know, through cleansing, what is called, well, the sweat lodge ceremony. He prepares himself to capture the eagle and then he sets up a trap and he sits there. When he sets up his trap he just sits there and waits for the eagle to come and then when he comes he grabs the eagle and kills it there. I was also told that sometimes the eagles were frightened to death so that you don't physically kill [50] them. My mother is the one that told me about that particular practice, I guess. You know, she honestly believed that in some instances eagles were frightened to death; so, that is how they were killed.

Q. Would there also be a ceremony following when an eagle was killed?

A. Yes. After you capture the eagle and you bring them back you, of course, purify them with sweet grass and you yourself perform the sweat ceremony to cleanse yourself.

Q. Was the eagle ever used for food for Indians?

A. Not that I am aware of.

Q. Now, the parts of the eagle you indicated are used for sacred items within Indian traditions and traditional Indian religious beliefs?

A. Yes.

Q. Is the commercialization of sacred items considered improper and not acceptable to traditional Indian beliefs?

A. Yes, I would say that. I would say it is improper to sell, I suppose, the eagle. When the eagle is alive it is held sacred and you approach it with great reverence, if you are to take an eagle and the intention to take an eagle is usually for a specific purpose and, once you capture the eagle and you take its life, you do that for the purpose of converting it to some use in a religious article or something, or the use of the feathers.

* * * * *

TESTIMONY OF MARTIN BROKEN LEG

* * * * *

[61] Q. The bald and golden eagle within both the traditional and religious belief of the Indians within South Dakota? [sic]

A. Yes.

Q. And how is the eagle looked upon within that traditional Indian belief?

A. It is looked upon in religious mythology—which would mean no priority of the term, only that we are referring to remembrances, the authorship of which is unknown—in Lakota mythology the eagle is the intermediary between the beings of this world and of the spiritual realm which we see physically by their characteristic of flying higher than all other things. Additionally, the Sioux Nation is descended from the eagle because an eagle was the male when the woman survived the flood which destroyed all living things on the world. So, it is in the capacity as messenger, religious messenger, between this realm and the spiritual realm that the eagle is most highly venerated.

Q. Is what? I'm sorry.

A. Most highly venerated.

Q. Are you aware through your education, training and teaching, of whether or not the eagle was ever hunted by the Indian for food?

[62] A. No. It was not hunted for food.

Q. If they were hunted, how were eagles hunted?

A. Eagles were captured; but, were not hunted in the sense of sought after with a weapon.

Q. How were they captured, through traditional Indian beliefs?

A. They were captured by following a whole series of religious prescriptions which entailed rites of preparation, the digging of a pit in a certain prescribed manner and using some sort of bait, as a white rabbit or a deer on top of the brush cover over the pit. When the eagle landed and came to examine the bait, then the person who was within the pit would reach through and, hopefully, grab both feet of the bird, pulling it into the pit. And then there were a number of prescriptions that followed on what was to be done with the bird following its capture.

Q. Were there also ceremonial purifying ceremonies that were done by the Indians after the capture of an eagle?

A. Yes, consisting of great detail. Numbered amounts of tobacco was [sic] to be used. Numbered amounts of smoke in the sweat lodge, who can be present and who cannot be present. What can be touched and what cannot. The whole matter is prescribed within the tradition.

Q. Were the eagles let go after they were captured?

[63] A. Occasionally. Among the Sioux they were most often strangled.

Q. When they would let them go, how would this occur?

A. They would be apologized to, which would address the spiritual being of the eagle and the Creator. The person would speak to them in an apologetic manner and then take them to someplace where they could fly away freely and where they could encounter other eagles.

Q. Would they remove feathers before letting the eagle go?

A. Yes.

Q. And when eagles were killed, for what purpose were they killed?

A. They were killed so that the feathers could be retained and other parts of the eagle could be retained also.

Q. And for what purpose would those items be retained, if not for food?

A. For some item of religious significance such as the wearing of an eagle emblem, because it was a part of that person's vision or part of their spirit helper.

Q. Was it part of traditional, and by traditional I guess I mean both pre-reservation and post-reservation beliefs, religious beliefs, to kill an eagle for commercial gain?

A. I have not encountered that in any course that I have studied.

* * * * *

TESTIMONY OF DWIGHT DION, SR.

* * * * *

[133] Q. Would you state your name for the record, please?

A. Dwight Dion.

Q. And is that Dwight Dion Junior or Senior?

A. Senior.

Q. Okay. And where do you live, Dwight?

A. I live four miles east and three and a quarter south of Lake Andes.

Q. Is that on the - is that here in South Dakota?

A. Yes, that is.

Q. Is it on the Yankton Sioux Indian Reservation?

[134] A. Yes, it is.

Q. Now, Dwight, are you a member of the Yankton Sioux Tribe?

A. Yes.

Q. Dwight, are you a member of the Native American Church?

A. Yes.

Q. Are you familiar with the beliefs and the tenets and the precepts of the Native American Church?

A. Yes, I am. I'm a what you call a senior elder in the Native American Church. I was supposed to be stepping up as a minister.

Q. How long have you been a member of the Native American Church?

A. Since I was thirteen years old.

Q. So, how many years would that be?

A. About forty-three.

Q. Would you say that would be about thirty years?

A. Yes, better. I have been—before that I was an associate member of the Native American Church until I became baptized and confirmed in the Native American Church at the age of thirteen.

Q. Now, Dwight, in the practice of the religion of the Native American Church, are there certain prayer instruments which are used?

A. Yes, sir.

Q. What type of instruments would be used in the Native [135] American Church?

A. Well, we have what you call, to begin with we have an altar. The altar consists of a "biote" (phonetic), we call it. And an altar cloth and a gourd, fan and the staff.

Q. Okay.

A. And a bible.

Q. Now, by a fan, what are you referring to?

A. Well, it's used as—there's different types of fans that we use. Like, I was using eagle feathers. Some come completely finished, with a handle and some as a single. Different use for different occasions. Like, sometimes, if we baptize a real young child, why, then I use what is called a bald eagle, a pure white, fan. And then in the regular, just a prayer service, which we have once a month, we use just a regular black tip, what they call a black tip fan. Then there is also what you call a drum and a drumstick. And there's—on this drum there's marbles and there's a rope and people use a deerhide or elkhide or moosehike, whichever is available.

Q. Okay. Now, with regard to these fans that are used, Dwight, can you tell me who makes these fans?

A. Yes.

Q. Who in the church makes these fans?

A. The people in the Native American Church makes these [136] fans. Like me, I just started making them. And there's other people that made them a lot longer than I ever have. But, each person, like me, I can go so far—just as far as the leather work is concerned. Then from there it is handed down to another guy to do the beadwork and fringes and so forth. So, it's always maybe, maybe two or maybe three persons involved in making one fan. If you're exceptionally good, good at it, well, then you learn how to do the beadwork, the leather work, the hackle-feather work and also the beading and the fringing of it. But, you have to have a lot of experience in it because it takes a long time to do them.

Q. What part of the work on the fans do you do, primarily?

A. I just started doing the leather work on it.

Q. How do you do that, that type of work?

A. That type of work, each fan, you take a separate, each fan from one another, and then you take and cut a little narrow strip of leather and then you put glue on it and put it up against a feather. Now, that's one way. And there also is another way of doing it. And some use what they call one of them little dowels, oh, wood. They take it and they cut them about "yay" long, you know, to make the feathers a little longer, where they can put more thread-work, what they call thread-work on it, and they work in all different colors, red, white, yellow, blue, [137] green, whatever they like. You know, somebody fixes it however that one person wants it, is how that man does it. You know, it's time-consuming. But, I don't go that far. I just do the leather work on it. And, far as putting the handle, what they call a handle on it, is made from a shotgun cleaning rod.

Q. Do you do work on the handle part?

A. On the handle parts, that's all I do.

Q. And the leather work?

A. And the leather work. I don't know how to bead. So, I hand it down to somebody else to do the beadwork for me.

Q. How long would you say it takes you to do the leather work and the handle work on the fan.

Q. If I stay steady at it, it will take me a day.

Q. Okay. How much longer does it take when these other people get involved with the beadwork, et cetara? How much longer would it take to complete a fan?

A. I'd say about a week, just to do a handle.

Q. Now, do all members of the Native American Church make fans or are there only certain people that do make fans?

A. No. Just certain ones. Just certain ones. Not all the members are capable of making them. So, it's just certain people that does make these fans.

Q. Is it a fairly small group of people who make fans? [138] A. Yes, especially when you go into beading. Beading, there's very few that do the beading of it. There is a limited numbers of people on the reservation that could do the beading.

Q. Okay. How are these fans exchanged from the craftsmen to the people who request them?

A. Well, like if I was or had some feathers and I wanted them done, I would do as much as I possibly can by myself, what little art that I know of it, and then I would hand it to the next guy and ask him to do it in exchange for something, you know, like, you know, something that he wanted that I had, why, then we would exchange for the work.

Q. Okay. So, it is primarily a barter system, is that correct?

A. Yes. You might say that, yes. There was never any money involved or implicated in any of it. Just exchange it there for different things. You know, like some guy says, "Well, you give me that drumstick," or "I like that drumstick," or something like that. We would give him that to do some work on it, you know. Because all of these drumsticks and all that, there is a real lot of work even into them. You know, there is a certain way it is carved and everything else. So, there is a lot of work.

Q. Are eagle feathers used in some of these fans?

[139] A. Yes. Yes. As far back as I could remember eagle feathers was always used in the Native American Church.

MR. DOW: I have nothing further, Your Honor.

A. I have some feathers on hand that is right around sixty years old myself.

MR. DOW: That's all I have, Your Honor.

THE COURT: The plaintiff may cross-examine.

MRS. ULRICH: Thank you, Your Honor.

* * * * *

DWIGHT DION, SR.,

[222] re-called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOW:

Q. Would you state your name for the record, please?

A. Dwight Dion, Sr.

MR. DOW: May I approach the witness, Your Honor?

[223] THE COURT: Yes.

(Defendants' Exhibit A marked for identification)

BY MR. DOW:

Q. Now, Dwight, showing you what has been marked as Defendants' Exhibit A, can you identify that for me?

A. Yes, sir. That's my acceptance, I think. Yes, Yankton Sioux Indian.

Q. Is that a letter?

A. Yes, a letter of acceptance.

Q. Who is the letter from?

A. From the Chairman of the Enrollment Committee, Yankton Sioux Tribe, Llewellyn Selwyn.

Q. When did you apply for membership in the Yankton Sioux Tribe?

A. I was always an enrolled member, as far back as I can remember.

Q. When did you receive this letter? Is the letter dated?

A. The letter is dated February 2, 1983. This here was given, sent out, to each enrolled member when the first Yankton Sioux claims were given out. But, I was always an enrolled member before this.

Q. What does that letter state?

A. It says, "Dear Dwight Dion: Your application for enrollment as a member of the Yankton Sioux Tribe has been appropriately reviewed for compliance with [224] constitutional membership provisions and as provided in the tribal enrollment ordinance. You have been determined to be *eligible* for membership and your name is being added to the official membership roll of the Tribe."

MR. DOW: Move the introduction of Defendants' Exhibit A.

MRS. ULRICH: No objection.

THE COURT: Exhibit A may be received.

BY MR. DOW:

Q. Now, Dwight, in the Indictment in this matter it is charged that in December of 1983 and January of 1983, that you took, I believe, four bald eagles and one golden eagle. Are you aware of that?

A. I'm aware of two bald eagles and two golden eagles.

Q. Are you aware that you are charged with those offenses?

A. Yes.

Q. Now, during that period of time, from December of 1982, through Januray of 1983, I'll ask you did you shoot any eagles?

A. You mean prior or after?

Q. During that period of time.

A. During that period of time, yes, when I was asked to.

Q. Well, from December, from the beginning of December of 1982, to the end of January, 1983, did you shoot any eagles during that period of time?

[225] A. Yes.

Q. Okay. Do you recall how many eagles you took during that period of time?

A. Five.

Q. Okay. Do you recall how many were bald eagles?

A. One.

Q. Okay. Do you recall how many were golden eagles?

A. Was four of them. But, I would say I don't know if that one is, but, they claim it's a premature bald eagle. Now, I don't know if anybody has ever seen a premature bald eagle or not. But, that's what they say it was.

Q. Were those all the eagles that you took during that period of time?

A. Yes.

Q. Where did you take those eagles?

A. I took them right—the first ones I got, I took them right from what they call the Colony. It's below the bluff. It's a real big bluff. You sit down below it when they come in and that's where I took them. And the last ones I took way over there, west, west of Greenwood about six miles. About six, maybe a little over. But, it's in that area there. And that's all on tribal grounds.

Q. That was my next question. Were you on the Yankton Sioux Indian Reservation when you took them?

[226] A. Yes.

Q. All these eagles that you have mentioned?

A. Yes. Yes.

MR. DOW: I have nothing further.

THE COURT: Cross-examination, the Government.

* * * * *

[229] Q. Do you remember agents known to you as Bob Stevens and [230] Nolan Martin coming to your house on December 13 of 1982?

A. Yes.

Q. And that was the day when—or do you recall that as being the day the Lyle Dion sold them an eagle, as well?

A. Yes.

Q. Do you recall Nolan Martin, Agent Mauldin, asking you, "Where do you find most of the eagles, on this side or on the other side?" Do you remember his asking you that question?

A. No.

Q. Do you remember and did you say to Agent Mauldin, "They're on both sides. In fact, I've been getting them during the day pretty good."

A. Yes.

Q. Do you remember saying that?

A. Yes.

Q. You were telling him, "they are on both sides of the river," is that right?

A. Yes.

MR. ULRICH: That's all I have.

THE COURT: Redirect examination?

REDIRECT EXAMINATION

BY MR. DOW:

Q. Now, Dwight, you may have stated that there were eagles on both sides of the river. Which side of the river did [231] you take the eagles on?

A. On the north side.

Q. I'm sorry. I didn't hear the answer.

A. North side. That's on the reservation side.

MR. DOW: Nothing further.

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DOCKET NO. 83-40025

SIOUX FALLS, SOUTH DAKOTA
SEPTEMBER 20, 21 and 22, 1983

UNITED STATES OF AMERICA, PLAINTIFF,

V.

DWIGHT DION SR., DEFENDANT.

VOLUME III
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JOHN B. JONES, AND
A JURY.

TESTIMONY OF NANDO MAULDIN

* * * * *

[21] Q. When was your next contact with the defendant, Dwight Dion, Sr.?

A. The 27th of October, 1981.

Q. Where did you see him on that day?

A. I was at his residence.

Q. You came to South Dakota?

A. Yes, ma'am.

Q. Was that from Salt Lake City?

A. Yes, ma'am.

Q. What brought you here to South Dakota on that day?

A. Well, we needed to continue the investigation and we had gone into a new fiscal year and the Federal Government—and as a result of this we had some additional funding to put into this particular investigation.

Q. And did you visit Dwight Dion at his house on October 27th of 1981?

A. Yes, I did.

Q. And where does he live?

A. He lives approximately four miles east and about two miles south of Lake Andes.

Q. And what happened on that occasion?

A. When I got there I was invited inside. He produced these two fans and we discussed the purchase of these fans and discussed his reason for not having mailed them COD. He [22] told me that he had come up with some money from another source and that he had not mailed them as a result of that.

He priced the two fans to me again at $850; $500 for the scissor-tail fan and three fifty for the eagle fan. We bargained back and forth over this and I wound up buying the fans from him. I gave him $500 in cash and I gave him $250 in merchandise in the form of turquoise jewelry which I had with me.

* * * * *

[44] Q. Where did you meet Agent Standish?

A. At the airport.

Q. Did you then go to the defendant's residence?

A. We rented an automobile and drove to Dwight Dion's residence.

Q. What happened when you got there?

A. Mr. Dion, he invited us in. He told us that he had the eagles. He displayed the two adult bald eagles and two immature bald eagles. He priced the immature eagles at $500 each. He priced the others at $750 each. I bought the two golden eagles. I gave him a thousand dollars in cash. I paid him in hundred-dollar bills.

Q. Did you say two golden eagles or two balds?

A. I'm sorry. I referred to them as golden. They're actually immature balds. They are dark in color, just like a golden eagle is. I bought the two immature bald eagles.

Q. How much did you pay for those?

A. Five hundred dollars each.

[45] Q. And who, if anyone, purchased the other two eagles that the defendant had for sale?

A. Agent Standish purchased them after considerable argument about the price of the second one.

Q. What did he purchase those two for?

A. He gave *$750* for one of them. He gave *$550* for the other one.

* * * * *

[50] Q. I show you now what has been marked as Government Exhibit Number 14. Can you identify that?

A. This is the tape that Agent Standish made on December 13th, 1982, at the Dwight Dion residence during our meeting with him there where we purchased these four eagles there.

* * * * *

[57] Q. How many birds altogether did you purchase on December 13th, 1982, when you were at the Dwight Dion residence?

A. Agent Standish and myself, together, purchased five.

Q. And of those five, four were purchased from the defendant?

A. This is right.

Q. Now, did you know or do you know which, of the four you purchased from the defendant, was shot by Dwight Dion, Jr.?

A. I do not know.

* * * * *

[58] Q. When was your next personal contact with the defendant?

A. On January 7th, 1983.

[59] Q. And when did that take place?

A. It took place at his residence at 9:50 p.m. We were there approximately ten minutes.

Q. And for what reason did you go to his house on that occasion?

A. We had been visiting in the residence of another subject a neighbor of the Dions. We were told by this other person that Dwight had two eagles that he wished to sell.

Q. Did you on that occasion—well, excuse me.

Who were you with on that occasion?

A. Agent Standish.

Q. Did Agent Standish accompany you to the Dwight Dion residence?

A. Yes, ma'am, he did.

Q. Did either you or Agent Standish purchase two eagles from the defendant on that day?

A. Yes, ma'am.

Q. What happened when you got to Dwight Dion's residence on January 7th at about 9:50 p.m.?

A. He said that he had two eagles.

Q. You say "he". Who are you talking about?

A. Dwight. Dwight said he had two eagles. He said that he had gotton them down on the river yesterday and he sent his son, Isaac, to go get them. When Issac returned he had a mature bald eagle and a mature golden eagle. He [60] said that he had killed them with a shotgun using buckshot.

Q. Who said he killed them with a shotgun?

A. Dwight.

Q. Where did Isaac go to get the eagles?

A. It was after dark and Isaac went out the kitchen door of the residence. I'm not sure where he went. The eagles were not frozen. They were hanging outside. It was cold weather. They were cold from hanging out in the cold weather. But, they were not frozen.

Q. Until you had been at this other person's house visiting, did you know that Dwight had two more eagles?

A. No, ma'am.

Q. Had you had any other contact with him between December 13th and January 7th?

A. No, ma'am.

Q. Did the defendant say where he had killed the eagles?

A. Dwight said he killed them down on the river. He actually took his thumb and pointed at his chest and said, "Here's the guy that gets them."

* * * * *

[62] Q. After that occasion when was your next contact with the defendant, your next personal contact?

A. The 10th of March, 1983.

Q. And where did that take place?

A. At Dwight's residence.

Q. When had you arrived in South Dakota on that occasion?

A. I had flown up there, I believe, on the afternoon of the 9th and met with Agent Standish. We rented a car and rode down to Lake Andes and to Dwight's residence.

Q. What had brought you to South Dakota on that occasion?

A. I had received a telephone call on the 26th of February, advising me that Dwight had killed two eagles and he was wanting to sell them.

Q. Did you purchase, you or Agent Standish, purchase those two eagles on March 10th of 1983?

A. Agent Standish purchased them.

Q. And were you with Agent Standish when he purchased the eagles?

A. Yes, ma'am.

* * * * *

* * * * *

[104] Q. All right. When was the next time that you met with the defendant, Dwight Dion, Sr.?

A. It was on January the 7th, 1983.

Q. Where did you meet with him at that time?

A. That was at his residence in Charles Mix County, South Dakota.

[105] Q. Was anyone with you?

A. Yes. Special Agent Mauldin was with me on that occasion.

Q. When did you arrive in South Dakota?

A. I came into South Dakota the morning of January the 7th about 11:30 a.m. I arrived by commercial airline.

Q. Did you meet with Agent Mauldin?

A. Yes. I met him at the Sioux Falls airport and we rented a vehicle and went over to Charles Mix County.

Q. And what took you to the Dwight Dion residence on that occasion?

A. Another individual who we met in the Lake Andes area on that day told us that the defendant, Dwight Dion, had two eagles to sell.

Q. What happened when you got to Dwight Dion's house?

A. He said he did have two eagles and he said he killed the eagles yesterday, using a shotgun at night with buckshot. And we were only at the residence approximately ten minutes. Two of his sons, Isaac and Dwight Dion, Jr., brought the eagles inside the house. I believe they came in through a side door. And the eagles were not frozen. They were cold from hanging outside. One of them had a small string or a very small rope around its neck. They said they had been hanging outside. And the defendant, Dwight Dion, offered to sell them and Special Agent Mauldin purchased the two eagles [106] for $1,000. One of the eagles was a mature bald eagle and the other was a golden eagle.

Q. Did the defendant indicate who was the person that had killed these eagles?

A. Yes. He stated that he had killed them yesterday. I believe he said he got them down on the river.

* * * * *

[108] Q. When was the next time that you saw the defendant after January 7th of 1983?

A. On February the 16th, 1983.

Q. And was that also a personal contact here in South Dakota?

A. Yes, it was. It was at the defendant's residence.

Q. Was anything purchased from the defendant on that day?

A. No, ma'am.

Q. Did you have a conversation with the defendant regarding eagles?

A. Yes, I did.

Q. What was that conversation?

A. The conversation—we weren't there very long. It mainly centered around the topic of how his son, Lyle, and himself had recently been turned in to authorities for allegedly selling or dealing in eagles. And the defendant also stated that he would go out and get more eagles and that he was going over into the refuge area to obtain some eagles.

* * * * *

GOVT. EX. 14-A: TRANSCRIPT OF TAPE RECORDED MEETING BETWEEN SPECIAL AGENT NANDO MAULDIN (SAM), SPECIAL AGENT ROBERT STANDISH (SAS), AND DWIGHT DION, SR. (DWIGHT, SR.) ON DECEMBER 13, 1982.

* * * * *

[GOV'T EX. 14-A, at 3]

DWIGHT, SR.: Anyway, this guy was tellin' me from out west that, he said that they're back up that far but they ain't come back this far yet.

SAS: Wonder why that is.

DWIGHT, SR.: I don't know, probably on account of the weather.

SAS: They come in here later, you think?

DWIGHT, SR.: I 'magine they'll be getting here later, if. . . if we ever get a storm but, uh, you know, as of now. . .

SAS: What, do you have to put a boat in to get them?

DWIGHT, SR.: No, I, I, uh. . .

SAS: You just walk along the river?

DWIGHT,SR.: I just, uh, what I do is I just drive down to the river here and I just park my pick-up on a point and I just sit there all day.

SAS: Huh.

DWIGHT, SR.: That's the how, uh, that's the only way I can, uh, you can go out and get one on a boat.

SAS: Yeah.

DWIGHT, SR.: But they've dropped the water so damn low and you can't get, you know, to the shore to them. You gotta stay in the channel.

SAM: When you say they've dropped the water, are you not right in the river? Whereabouts are you that they could control the water level?

[GOV'T EX. 14-A, AT 4]

DWIGHT, SR.: Right here at Pigstown.

SAM: At Pigstown?

DWIGHT, SR.: Yeah.

SAM: Is that above the dam or below it?

DWIGHT, SR.: That, that's above, that's right down here. They control the, the water flow.

SAM: Below the dam?

DWIGHT, SR.: Yeah, below the dam.

SAM: I see.

DWIGHT, SR.: They they shut, they shut, I think, usually about this time in December they usually only use one, uh, generator down there and then that one takes care of everthing at night, you know.

SAS: Yeah.

DWIGHT, SR.: And then during the day they open it up a little bit, not very much. That water has been so darn low that it is pitiful. You can just about walk clear across that river.

SAM: Really?

SAS: Is that right? Huh.

SAM: Where do you find most of the eagles, on this side or on the other side?

DWIGHT, SR.: They're on both sides. In fact, I've been getting them during the day pretty good.

SAM: Somehow when I was talking to your. . . , to Viola, I guess, or maybe it was to you, I got the impression maybe you were having to get 'em at night or real late in the evenings.

VIOLA: Yeah.

DWIGHT, SR.: Been getting 'em. . .

VIOLA: Sometimes he has. . .

[GOV'T EX. 14-A, at 5]

DWIGHT, SR.: Sometimes, uh, like the first one I got during the night and then, then the other ones I got during the day.

SAM: You just find them in a tree and get them?

DWIGHT, SR.: Yeah, I just sit down there in the trees and wait for 'em to come over me.

* * * * *

[GOV't Ex. 14-A, AT 22]

* * * * *

DWIGHT, SR.: That is where you guys are going to be hurting, you know, if somebody ever finds out, you know.

SAS: Yeah.

DWIGHT, SR,: If you're gonna have them mounted or stuffed or something, you are going to have to keep that pretty. . .

SAS: Aw, they keep them in their own house, yeah.

DWIGHT, SR.: Keep them pretty hush-hush, you know.

SAS: Yeah.

DWIGHT, SR.: If somebody gets ahold of it and it comes back to me, I'll probably do about 25, 30 years for it. Right now, the fine is $10,000, 10 years.

SAS: Really!

SAM: I didn't know what it was.

DWIGHT, SR.: Yeah, $10,000 and 10 years.

SAS: $10,000 and 10 years for just killing one.

DWIGHT, SR.: For just killing one.

SAM: It don't matter where it's a bald or a golden?

[GOV'T EX. 14-A, at 23]

DWIGHT, SR.: It don't matter what kind it is.

SAM: Same fine?

SAS: There must not be very many of them or something.

DWIGHT, SR.: Well, there. . .

SAS: I know there isn't down there.

DWIGHT, SR.: Last year they counted 385 down here.

* * * * *

[GOV'T EX. 14-A, AT 29]

* * * * *

SAS: Is there anybody else getting any around, Dwight, that you hear of, or not?

DWIGHT, SR.: Not that I know of. He's the first one I knew of that got one this year so far.

SAS: Lyle?

DWIGHT, SR.: Lyle. It takes a lot of time and a lot of patience.

SAS: Yeah.

DWIGHT, SR.: Sometimes, like he said, he left . . . and when he got back they come right over you, you know, sometimes when you're out hunting, then they'll come buzz right over you.

SAS: Yeah.

DWIGHT, SR.: But if, like me, I could have got a dozen or two of them, uh, golden eagles but, uh, I didn't, you know. I just set and set and wait and wait . . .

SAS: Waiting for the white . . .

DWIGHT, SR.: Waiting for the white one.

SAS: Yeah.

DWIGHT, SR.: So I spent a lot of time down there waiting. Then I had to drag my boat down there and when he come down, he hit in the river.

UNSUB: (Unintelligible.)

DWIGHT, SR.: Broad daylight, too, that was broad daylight, too.

[GOV'T EX. 14-A, AT 30]

SAS: Oh, that white one.

DWIGHT, SR.: Yeah.

SAS: Well, do you have to take your boat down with you.

DWIGHT, SR.: No, I . . . I had to come clear back up and get it.

SAS: Oh, really?

DWIGHT, SR.: Yeah, and I chased him downriver and I was lucky there wasn't nobody on the river then.

SAS: Yeah.

DWIGHT, SR.: But I got a pretty good sized boat and motor so (unintelligible).

* * * * *

GOV'T EX. 16-A: TRANSCRIPT OF TAPE RECORDED TELEPHONE CONVERSATION BETWEEN SPECIAL AGENT ROBERT STANDISH (SA) AND DWIGHT DION (DD), ON DECEMBER 7, 1982.

* * * * *

[GOV'T EX. 16-A, AT 9]

SA: Oh, yeah, they're bad then, yeah. But all, you say the feathers are all real good except on one of these?

DD: That . . .

SA: These birds you got?

DD: Well, they're, I got the, them, uh, the two white ones are perfect.

SA: Yeah.

DD: And, uh, the one golden eagle is, uh, in real good shape, in perfect shape. And that fourth one is just, uh, you know, it hit the branches comin' down.

SA: Yeah. How big a rifle you use?

DD: Uh, magnum.

SA: Ah.

DD: .22 mag.

SA: Oh, .22, yeah, yeah. What do you have to get 'em, in the daytime or at night?

DD: Getting 'em in the day.

SA: Yeah.

[GOV'T. EX. 16-A, AT 10]

DD: It takes a long time, I gotta ch . . . I go about eighteen miles I drive every day, you know, go down back and forth.

SA: Oh, really?

DD: Sit down there and wait.

SA: Yeah. What is it on that ref . . . uh, Nolan said there was a refuge or somethin' over there.

DD: No, no. It's uh, I am, where I'm gettin' 'em is on this side of the refuge.

SA: Oh.

DD: They comin' across, when they come across, well then I get 'em.

SA: Yeah.

DD: But I'm not, you know, bothered by the refuge.

SA: Oh, that's good. Yeah, don't let 'em.

DD: Yeah, 'cause I'm scared of gettin' caught, too, you know.

SA: That's what I say. I'll bet you would be. I would be.

DD: Ten thousand and ten years.

SA: Well, that's what the fine would be?

DD: Yeah.

SA: Ten thousand dollars?

DD: Ten thousand and ten years.

SA: Gees, yeah, well, make sure you don't tell nobody about it.

DD: Don't worry about that. I keep everything pretty quiet.

* * * * *

GOV'T. EX. 17-A: TRANSCRIPT OF TAPE RECORDED MEETING BETWEEN SPECIAL AGENT NANDO MAULDIN (SAM), SPECIAL AGENT ROBERT STANDISH (SAS), AND DWIGHT DION, SR. (DD), ON MARCH 10, 1983

* * * * *

[GOV'T Ex. 17-A, AT 6]

SAM: You killed these down on the river?

DD: I got these on this side.

SAM: On Indian land or what?

DD: I got them on Indian land this time.

SAM: This time was on the Indian reservation.

SAS: On this side of the refuge?

DD: Yeah, east of Greenwood. Do you know where Greenwood's at?

SAM: I know where it's at on a map. I've never been there.

DD: Gees, I walked about, 'bout three miles or better, all the way down and had to carry 'em on my shoulder all the way back up through there.

SAS: At night, or . . .

DD: Yeah, at night (unintelligible).

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

Nos. 83-2353/2538/2543/2544-SD

UNITED STATES OF AMERICA, APPELLANT/APPELLEE,

v.

DWIGHT DION, SR., ET AL., APPELLEES/APPELLANTS.

Appeals from the United States District Court
for the District of South Dakota

Petition for rehearing en banc submitted by the United States of America has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

AUGUST 20, 1985

In the Supreme Court of the United States

No. 85-246

UNITED STATES, PETITIONER

v.

DWIGHT DION, SR.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 15, 1985

PETITIONER'S

BRIEF

(4)

No. 85-246

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

DWIGHT DION, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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43pp

QUESTION PRESENTED

Whether Indian tribal hunting rights provide a defense to the taking prohibitions of the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, or the Endangered Species Act of 1973, 16 U.S.C. (& Supp. II) 1531 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-246

UNITED STATES OF AMERICA, PETITIONER

v.

DWIGHT DION, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The January 9, 1985, opinion of the court of appeals, sitting en banc (Pet. App. 1a-23a), is reported at 752 F.2d 1261. The May 20, 1985, opinion of the court of appeals panel (Pet. App. 24a-66a) is reported at 762 F.2d 674. The September 8, 1983, order of the district court dismissing Count 12 of the indictment (Pet. App. 69a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 67a-68a) was entered on May 20, 1985. On July 9, 1985, Justice Blackmun granted an extension of time to and including August 18, 1985, within which to file a petition for a writ of certiorari. The petition was filed on August 13, 1985, and was granted on October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Bald Eagle Protection Act (BEPA), 16 U.S.C. 668(a), provides in relevant part:

> Whoever * * * shall * * * take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, * * * shall be fined not more than $5,000 or imprisoned not more than one year or both * * *.

Section 668a provides in relevant part:

> Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof * * * for the religious purposes of Indian tribes * * * he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: * * * *Provided* * * * That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior * * *.

2. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1532(13), provides in pertinent part:

> The term "person" means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

Section 1538(a) provides in pertinent part:

> (1) Except as provided in sections 1535 (g)(2) [transition provisions] and 1539 [permits and exemptions] of this title, with respect to any endangered species of fish and wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—
>
> * * * * *
>
> (B) take any such species within the United States or the territorial sea of the United States;
>
> * * * * *
>
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C)[.]

Section 1539 provides in pertinent part:

> (e) Alaska natives
>
> (1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species * * * by—

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes * * *.

* * * * *

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village.

STATEMENT

1. Although the bald eagle has been protected by federal statutes and regulations since 1940, it remains an endangered species throughout most of the 48 coterminous states (43 Fed. Reg. 6230 (1978)). Even in the Northwest and the upper Great Lakes Region, where the bald eagle is most frequently found, it is a threatened species (*ibid.*). Surveys conducted by the Fish and Wildlife Service showed only approximately 1400 nesting pairs in the 48 coterminous states in 1984.[1] The 1984 midwinter count showed a total of 200 bald eagles in South Dakota,

[1] Region 2, Fish and Wildlife Service, *Regional Resource Plan* 320 (Aug. 17, 1984).

and 11,819 throughout 43 of the lower 48 states.[2] This precarious situation is in part due to the widespread loss of suitable habitat, but the Service reports that "[s]hooting continues to be the leading cause of direct mortality in adult and immature bald eagles, accounting for about 40 to 50% of birds picked up by field personnel" (*id.* at 6232).

a. In enacting the Eagle Protection Act in 1940, Congress attempted to protect this country's eagle population by imposing stringent restrictions on the taking of eagles, coupled with a total prohibition on commercial transactions in the birds (16 U.S.C. 668). Section 1 of the Act, 16 U.S.C. 668, makes it unlawful—and subject to a maximum penalty of $10,000 and two years' imprisonment—knowingly or wantonly to possess, take, buy, sell, barter, or transport any bald eagle or golden eagle,[3] alive or dead, "or any part, nest, or egg thereof," except as permitted by the Act.[4] The Act authorizes the Secretary of the Interior to permit "taking, possession, and transportation of [eagles]" for the religious purposes of Indian

[2] National Wildlife Federation Press Release No. 84075 (Sept. 4, 1984).

[3] The Act originally applied only to bald eagles. It was amended in 1962 to cover golden eagles as well. Although not quite so scarce as bald eagles, golden eagles are also threatened with extinction, and are difficult to distinguish from bald eagles before maturity. S. Rep. 1986, 87th Cong., 2d Sess. 6 (1962); Joint Resolution of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246.

[4] Each taking or other prohibited act with respect to a single eagle constitutes a separate offense (16 U.S.C. 668(a)). A civil penalty of up to $5,000 is also provided for each violation of the Act; neither a knowing nor a wanton violation need be shown for assessment of the civil penalty. Compare 16 U.S.C. 668(b) with 16 U.S.C. 668(a).

tribes, and for certain other very narrowly circumscribed purposes,[5] but only when he has determined, after investigation, that such taking "is compatible with the preservation of the bald eagle or the golden eagle." 16 U.S.C. 668a. See *Andrus* v. *Allard*, 444 U.S. 51, 56-57 (1979) (constrasting "sweepingly framed" prohibitions of BEPA with its "specifically limited" exceptions).

b. The Endangered Species Act of 1973, 16 U.S.C. (& Supp. II) 1531 *et seq.*, described by this Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" (*TVA* v. *Hill*, 437 U.S. 153, 180 (1978)), reflects a similar congressional concern with this nation's disappearing wildlife. The 1973 Act replaced earlier statutes authorizing the establishment of programs for habitat preservation and prohibiting the importation of wildlife threatened with worldwide extinction. Act of Oct. 15, 1966, Pub. L. No. 89-669, 80 Stat. 926 *et seq.*; Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 *et seq.* The 1973 Act reflects congressional recognition that these limited efforts were insufficient.[6]

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[5] *I.e.*, for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or of golden eagles as necessary to protect wildlife or agricultural interests. The Secretary may also permit the taking, transportation, and possession for falconry of golden eagles that would otherwise be subject to taking because of depredations on wildlife or livestock, and the taking of golden eagle nests that interfere with resource development or recovery operations. 16 U.S.C. 668a.

[6] Worldwide concern with the precarious situation of many kinds of wildlife is reflected in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087 *et seq.* an international agreement to restrict trade in endangered species, which was implemented by the ESA (16 U.S.C. 1538(c)).

Section 4(a) of the ESA, 16 U.S.C. 1533(a), empowers the Secretary of the Interior to list species as either "endangered" or "threatened."[7] The Secretary's decision to list a species is based upon such factors as present or threatened destruction of a species' habitat or range; its overutilization for commercial, recreational, scientific or educational purposes; disease; or the inadequacy of existing regulatory mechanisms (*ibid.*).[8]

Section 9 of the ESA, 16 U.S.C. 1538, contains the Act's prohibitions. Congress has imposed an absolute prohibition on, inter alia, the taking of any endangered species within the United States, the possession of any illegally taken endangered species, and the sale or offer for sale of any endangered species in interstate or foreign commerce. 16 U.S.C. 1538(a)(1)(B), (D) and (F). The prohibitions concerning endan-

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[7] An "endangered" species is a species which is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A "threatened" species is a species which is "likely to become an endangered species within the foreseeable future." 16 U.S.C. 1532(20).

[8] The Secretary is directed to publish in the *Federal Register* a list of all endangered and threatened species, specifying, for each such species, the portion of its range over which it is endangered or threatened. The current list appears at 50 C.F.R. 17.11(h). The bald eagle is listed as threatened in Washington, Oregon, Wisconsin, Minnesota and Michigan. It is endangered in all the other lower 48 states, including South Dakota. The golden eagle is not currently listed.

The bald eagle is also listed in Appendix I of CITES, *supra* note 6, receiving the most stringent protection under that international treaty. 50 C.F.R. 23.23.

gered species generally apply as well to threatened species unless the Secretary by regulation provides otherwise. 16 U.S.C. 1538(a)(1)(G); 50 C.F.R. 17.31.

The exceptions to these absolute prohibitions are extraordinarily narrow. Indians, Aleuts or Eskimos who are Alaskan Natives residing in Alaska, and (in some circumstances) other non-native permanent residents of Alaskan native villages may take endangered or threatened species, but only if the taking is primarily for subsistence purposes and only subject to such regulations as the Secretary may issue upon his determination that such takings materially and negatively affect the endangered or threatened species. 16 U.S.C. 1539(e). In addition, the Secretary may permit otherwise prohibited acts for scientific purposes, to enhance the propagation or survival of the affected species, or when such taking is incidental to carrying out of an otherwise lawful activity, but such permits may be issued only on the basis of stringent statutory procedures designed to assure that any adverse impact on the species involved will be minimized (16 U.S.C. 1539(a)).[9]

c. The bald eagle is also protected by two international treaties to which the United States is a party. In 1936, the United States and Mexico agreed to establish closed seasons on the taking of certain birds which migrate between those two countries. Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311 *et seq.* The only exceptions to the treaty prohibition

[9] The Act also contains limited interim measures to ameliorate the effect of the new legislation on those engaged in previously lawful occupations (16 U.S.C. 1535(g)(2), 1539(b)).

on the taking of birds during the closed season are for private game farms, or when such species are "used for scientific purposes, for propagation or for museums." Art. II(A), 50 Stat. 1312. In 1972, the bald eagle was added to the list of birds protected by this treaty. Agreement Supplementing the Agreement of February 7, 1936, 23 U.S.T. 260 *et seq.* In 1976, the United States entered into a treaty with the Soviet Union for the protection of migratory birds, including the bald eagle. Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, 29 U.S.T. 4647 *et seq.* In the treaty, the parties agreed to "prohibit the taking of migratory birds," outside hunting seasons established by the parties. Art. II(1), 29 U.S.T. 4651. Certain exceptions are specified for takings for "scientific, educational, propagative, or other specific purposes not inconsistent with" the purposes of the Convention, and for takings for the "purpose of protecting against injury to persons or property." Art. II(1)(a) and (d), 29 U.S.T. 4652. The treaty also contains an exception for the taking of migratory birds and the collection of their eggs by the "indigenous inhabitants" of certain regions in the Soviet Union and the State of Alaska, where the taking is for the inhabitants' "own nutritional and other essential needs." Art. II(1)(c), 29 U.S.T. 4652. The United States has implemented both these treaties in the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703-711; 16 U.S.C. 712, 715(j). See 16 U.S.C. 1531(4).

2. Beginning in late 1980, the United States Fish and Wildlife Service (FWS) conducted an undercover investigation into the illegal taking and selling of bald and golden eagles and other migratory birds

in South Dakota.[10] The investigation was prompted by information that an abnormal number of eagles were being shot or trapped around the Karl Mundt National Wildlife Refuge, near Lake Andes, South Dakota, and that feathers from eagles killed in South Dakota were being sold in New Mexico (III Tr. 14-15).

FWS agent Nando Mauldin, acting in an undercover capacity as a trader in Indian crafts, wrote to several individuals in South Dakota whose names he had obtained in New Mexico as being possible sources for eagle feathers. In response to one of these letters, Joe Abdo telephoned Mauldin to advise him that he did have eagle feathers, and invited Mauldin to South Dakota to meet with a number of sellers of eagle feathers. III Tr. 15-16.

On February 25, 1981, Mauldin went to South Dakota where Abdo introduced him to respondent, one of the "main actors in the protected bird and feather trade" (Pet. App. 28a). Over the next two years, FWS agents purchased from respondent the carcasses of seven bald eagles and one golden eagle, as well as numerous Indian crafts containing the feathers of various birds protected by the BEPA, the ESA, and the MBTA (III Tr. 16-19, 21-22, 43-45, 58-61, 62, 101-104, 105-106, 109-110).

Respondent is an enrolled member of the Yankton Sioux Tribe (J.A. 26-29). The Yankton Sioux reservation is located in southeastern South Dakota, directly across the Missouri River from the Karl Mundt National Wildlife Refuge. This refuge, which was established for the express purpose of protecting bald

[10] Operation Eagle resulted in charges against more than 40 individuals. Many of these were Indians who live on or near the Yankton Sioux Reservation (III Tr. 65-66).

eagles, is one of the largest wintering areas for the bald eagle in the lower 48 states (II Tr. 158-163). Between 200 and 300 eagles use the refuge each year, with a peak population at any one time of approximately 120 eagles (*ibid.*). The eagles are attracted to the refuge because of the open water from a nearby dam on the Missouri River, the easy access to fish, and the plentiful cottonwood groves along the river that provide necessary protection for winter roosting areas (*id.* at 163).

In a pretrial hearing, respondent testified that he was on the reservation when he killed the eagles (J.A. 28-29). During the undercover operation, however, respondent told the agents that he went to the Missouri River to hunt eagles, and that there were eagles on both sides of the river.[11] On one occasion when respondent offered to get additional eagles for the agents, he told them he intended to go into the refuge itself (J.A. 36).[12]

3. In the district court, respondent was charged with one count of taking a golden eagle in violation of the BEPA (Count 12); two counts of taking bald eagles in violation of the ESA (Count 8 and 10); and ten counts of selling the whole carcasses or parts of

[11] GXs 14, 16, 17; III Tr. 42, 52, 100 (tape recordings of conversations with respondent on December 13, 1982, December 7, 1982, and March 10, 1982, respectively). Transcripts of the tape recordings, which were provided for the jury's use during trial, were made a part of the record, although they were not admitted as exhibits (III Tr. 52-53, 100-101). Copies of the pertinent portions of the transcript are included in the J.A. 37-43.

[12] Respondent told the agents that he killed 15 to 20 eagles a year, that he had killed eagles for years, and that a number of people in the Indian community depended on him to get eagle feathers (III Tr. 22, 33).

eagles and other migratory birds in violation of the BEPA and MBTA.

Respondent moved before trial to dismiss all counts on the basis of *United States* v. *White*, 508 F.2d 453 (8th Cir. 1974), alleging that all the takings occurred on the Yankton Sioux Reservation. In *White*, the Eighth Circuit held that the BEPA "taking" prohibitions did not apply to a Chippewa Indian exercising treaty hunting rights on his reservation, because Congress had not expressed a sufficiently clear intent to abrogate those rights when it enacted the statute. Respondent argued that the *White* rationale should be extended to include takings of wildlife protected by the ESA and sales of birds protected by the BEPA and MBTA.

The district court, construing *White* narrowly, dismissed only Count 12, which charged a taking in violation of the BEPA. It refused to dismiss Counts 8 and 10, which charged takings in violation of the ESA, concluding that in that Act Congress had intended to abrogate treaty hunting rights as to endangered species. It reasoned that the right to hunt bald eagles "would have no value if Bald Eagles became extinct" (Pet. App. 71a). The district court also refused to dismiss the ten counts charging sales of eagles and other migratory birds. The court concluded that even if the BEPA and MBTA did not abrogate respondent's treaty right to hunt the protected birds on his reservation, those Acts could "properly prohibit the commercial sale" of those birds. Pet. App. 71a.

A jury convicted respondent on the two remaining taking counts and on eight of the sales counts.[13] Re-

[13] The government dismissed two of the sales counts at the start of the trial (III Tr. 5-6).

spondent appealed his convictions on these counts. The United States appealed the district court's dismissal of Count 12.

4. On appeal, respondent's case was consolidated with the appeals of three other Indians convicted in prosecutions arising out of Operation Eagle: respondent's son, Lyle Dion; Asa Primeaux, Sr.; and Primeaux's son-in-law, Terry Fool Bull.[14] Only respondent and his son asserted a treaty defense to their convictions at the appellate stage.[15]

Because the United States was seeking the overruling of *United States* v. *White*, *supra*, it requested an en banc hearing at the outset of the appeal. Although the appellate court initially denied that request, a three-judge panel, after oral argument, transferred the treaty issues to the en banc court for consideration.

The en banc court reaffirmed *White* and extended its application to criminal prosecutions under the Endangered Species Act (Pet. App. 22a).[16] First,

[14] Asa Primeaux, Sr., was convicted on eight counts of selling bald and golden eagles and other migratory birds, or parts thereof, in violation of the BEPA and the MBTA. Lyle Dion and Terry Fool Bull were each convicted on one count of taking a bald eagle in violation of the ESA and one count of selling it in violation of the MBTA (Pet. App. 35a, 55a).

[15] Terry Fool Bull is an enrolled member of the Rosebud Sioux Tribe, but the violations with which he was charged occurred on the Yankton Sioux Reservation. Asa Primeaux, Sr., an enrolled member of the Yankton Sioux Tribe, was convicted of selling protected birds, but not of taking any birds. Neither pursued the treaty defense on appeal. See Pet. App. 4a n.4 (incorrectly implying that Primeaux is not a Yankton Sioux).

[16] Judges McMillian, Bright and Fagg dissented; they would have overruled *White* (Pet. App. 23a).

the court found that the Dions had a treaty right to hunt eagles but not to sell them or other migratory birds. Because there was no treaty right to sell, the court reasoned that there was also no treaty right to take eagles for a commercial purpose. Pet. App. 8a-9a. Relying upon *White*, the court reaffirmed that it would require an express reference to treaty rights either in the statute itself or in its legislative history before it would find a congressional abrogation of these rights. Pet. App. 14a-15a. The court did not find such an express statement in either the BEPA or the ESA. Pet. App. 19a-22a.[17]

The court also rejected the government's argument, based upon the *Puyallup* trilogy,[18] that generally applicable federal conservation statutes may limit the exercise of Indian hunting rights. In contrast to the *Puyallup* cases, which the court stated involved a "shared" treaty right—*i.e.*, the right to take fish in common with non-Indians—the court here found that the Yankton Sioux would not have understood the treaty "as permitting other sovereigns to regulate their exclusive on-reservation treaty hunting rights." Pet. App. 19a.

The court therefore affirmed the district court's dismissal of Count 12 against respondent, reversed his convictions on Counts 8 and 10, and affirmed his convictions on the eight counts charging illegal sales.

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[17] Because the only charges under the MBTA involved sales, not takings, the court did not consider whether the MBTA abrogated treaty rights (Pet. App. 10a-11a).

[18] *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe, Inc.* v. *Department of Game (Puyallup III)*, 433 U.S. 165 (1977).

Because respondent had no treaty right to take eagles or other protected birds for a commercial purpose, however, the court stated that the government was free to retry respondent on Counts 8 and 10 if it could prove, under proper instructions, that his takings were commercially motivated. Pet. App. 22a-23a.[19] For the same reasons, the en banc court reversed Lyle Dion's taking conviction and affirmed the district court's refusal to dismiss the count charging an illegal sale (*id.* at 23a).

The en banc court then remanded all four cases to the panel for determination of the remaining nontreaty defenses. The panel subsequently reversed Lyle Dion's and Terry Fool Bull's convictions outright, holding that they were entrapped as a matter of law (Pet. App. 65a-66a). The panel rejected respondent's claim that the taking and selling prohibitions of the BEPA, ESA and MBTA, as applied to him, violated his First Amendment right of religious freedom. The panel found that Dion was killing eagles "for commercial gain and not for religious purposes," thus no religious freedom issue was presented. The panel also rejected the other nontreaty

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[19] As to Counts 8 and 10, the court stated that the jury must determine whether respondent was a member of the Yankton Sioux Tribe; whether the takings occurred on the Yankton Sioux Reservation; and if the takings did occur on the reservation, whether or not the takings were for commercial purposes (Pet. App. 22a-23a). The first two facts were essentially undisputed (see pages 10-11 & note 11, *supra*), as was the fact that respondent sold the eagles to the agents (II Tr. 223-226; III Tr. 35-46, 183-186). The court did not consider whether the government could try respondent on Count 12 under the same circumstances.

defenses raised by Dwight Dion and Asa Primeaux, Sr.[20]

SUMMARY OF ARGUMENT

The treaty establishing the Yankton Sioux Reservation contains no express reservation of hunting rights. While such rights may legitimately be implied, there is no justification for inferring that they permit the treaty Indians to hunt any species to extinction. The parties to the treaty, who assumed that supplies of wildlife were inexhaustible, cannot reasonably be thought to have intended to reserve any such right to the Indians. It is particularly unlikely that the Indians would have demanded, and the federal government have granted, the right to exterminate the eagle, a species that both parties had a particular interest in preserving. This Court's *Puyallup* decisions (see note 18, *supra*) confirm that there is no federal treaty right to hunt any wildlife to extinction. Instead, the migratory nature of wildlife means that the federal conservation laws, to be effective, must also regulate Indian takings to assure the survival of seriously endangered wildlife.

In any event, the Bald Eagle Protection Act and the Endangered Species Act clearly limit any treaty rights respondent might otherwise have to take the wildlife protected by those Acts. The language and legislative histories of both statutes show that Congress focused on the precise problem of Indian hunting of the protected wildlife, carefully weighed the Indian interests against the need to protect the wildlife involved, and struck a careful balance by permit-

[20] The court of appeals subsequently denied the government's petition for rehearing and rehearing en banc on the entrapment issue (J.A. 44). The government did not petition this Court for a writ of certiorari on that issue.

ting only specified narrow takings: in the BEPA for the religious purposes of Indian tribes, and in the ESA for the subsistence needs and economies of certain Alaskan natives. In both cases, even those takings are subject to control by the Secretary of the Interior as necessary to protect the species from extermination. Congress's concern with the effects of Indian on-reservation hunting of limited populations of endangered species, and particularly the bald eagle, was entirely reasonable, given the small populations of wildlife involved, the locations of many of their habitats on or near reservations, and the economic and other incentives for the Indians to hunt them, all exemplified by this case. In sum, although an intent to limit Indian treaty rights is not to be lightly inferred, the instant statutes cannot reasonably be interpreted in any other way.

ARGUMENT

I. THE YANKTON SIOUX DO NOT HAVE A TREATY RIGHT TO HUNT A SPECIES TO EXTINCTION

The court below based its holding that the BEPA and ESA prohibitions do not apply to respondent's non-commercial taking upon its conclusion that the Yankton Sioux Indians "would have understood [their] treaty as reserving in them the right to hunt eagles on their reservation, at least for traditional purposes" (Pet. App. 8a (footnote omitted)). We submit, however, that the pertinent treaty cannot properly be construed as granting respondent a right to hunt eagles, or any other endangered species, to the point of extinction.[21]

[21] In asserting that the record in this case contains no evidence that Indian hunting threatens the eagle with extinction (Pet. App. 18a n.14), the court below seriously mis-

1. In 1858, the United States negotiated a treaty with the predecessor of the Yankton Sioux Tribe in which the Yanktons ceded and relinquished to the United States all lands claimed by the tribe except for a 400,000 acre tract of land. Treaty with the Yankton Sioux, Apr. 19, 1858, art. I, 11 Stat. 744. The 1858 Treaty made no express reservation of any hunting rights on either ceded or retained lands, although an 1851 Treaty with certain bands of the Sioux Nation (including the Yankton Sioux), and other plains Indians, had recognized each tribe's territory and reserved to the tribes the "privilege of hunting, fishing, or passing over" each other's territory. Treaty of Fort Laramie, Sept. 17, 1851, art. 5, 11 Stat. 749, *reprinted in* C. Kappler, *Indian Affairs—Laws and Treaties* 595 (1904).[22]

In *Menominee Tribe* v. *United States*, 391 U.S. 404, 406 (1968) (citation omitted), this Court held that a treaty that granted lands for a home, " 'to be held as Indian lands are held,' " included the right to hunt and fish on reservation lands even though the treaty was silent as to such rights. The Court, however, refused to determine "the precise nature and extent" of those hunting and fishing rights. *Id.* at 407. See also *United States* v. *Winans*, 198 U.S. 371, 384 (1905); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389-390 (1902); *United States* v. *White*, 508 F.2d 453, 457 (8th Cir. 1974). We agree that rights to hunt and fish are implicit in treaties setting aside land for use by Indians as a reservation, but the rationale for such an implication does not justify extending that right to permit hunting to the point of extinction.

This Court has emphasized that Indian treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). The parties to nineteenth century Indian treaties simply did not consider whether the right to hunt or fish included the right to extirpate a species. Instead, as this Court noted in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 668-669 (1979), the parties believed that our wildlife resources were "inexhaustible" and did not contemplate any need for their conservation.

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apprehended the statutory schemes of both the BEPA and the ESA. In enacting the BEPA, Congress itself made the determination that bald (54 Stat. 250-251) and golden (76 Stat. 1246) eagles were in fact so threatened with extinction that all takings must be prohibited, subject only to certain very narrow exceptions, available only when the Secretary makes a specific finding that the taking is compatible with the continued existence of the species (16 U.S.C. 668a). In the ESA, the finding that a particular species is in danger of extinction, or likely to become endangered in the near future (16 U.S.C. 1532(6) and (2)) is a pre-condition to its listing, and the application to it of the statute's protections. 16 U.S.C. 1533, 1538; 50 C.F.R. 17.31(a). There is accordingly no need to establish anew the threat of extinction in individual prosecutions under these Acts. It is, in any event, clear that Indian hunting is a potentially serious threat to the attainment of the purposes of both the BEPA and the ESA. See pages 31-34, *infra*.

[22] In the 1858 Treaty, the Yankton Sioux agreed to—

> relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or any other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

Art. I, 11 Stat. 744. Thus, the 1858 Treaty extinguished whatever privilege the Yankton Sioux may have retained under the 1851 Treaty to hunt on lands not included within the 1858 reservation.

Given this historical setting, there is no basis for supposing that, had the present threat been contemplated, the Indians would have insisted on, and the United States would have conceded, an untrammeled right to hunt eagles regardless of the fate of the species. See *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916).

Indeed, in this case, uncontroverted expert testimony reveals that the Indians considered bald and golden eagles to be sacred, and that traditionally eagles were never hunted for food. II Tr. 9, 13, 39, 49-50, 61-62.[23] At least one native religion, the Native American Church of North America, is also opposed to the killing of eagles. *Id.* at 10. Because of the special religious and cultural significance of the eagle to the Indians, they have a particular interest in preserving that species for future generations. *Ibid.* See also H.R. Rep. 1450, 87th Cong., 2d Sess. 4 (1962) (letter from Ass't Secretary of the Interior supporting extension of BEPA to protect golden eagles, noting importance of golden eagle "in enabling

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[23] The House Committee considering the 1962 amendments to the BEPA heard similar testimony (*1962—Miscellaneous Fish and Wildlife Legislation: Hearings Before the Subcomm. on Fishery and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 35 (1962)):

> The Indians themselves did not kill [the eagles].
>
> * * * * *
>
> The Indians dug holes in the plains, secreted themselves underneath, and put carrion on top. They waited there until the eagle came down, reached up between the sticks, seized the eagle [by] the legs, and kept him alive throughout the summer period for him to drop his feathers and then it was released.

Compare J.A. 18, 20-21.

many Indian tribes * * * to continue ancient customs and ceremonies that are of deep religious or emotional significance to them," and concluding that "it is evident that the Indians are deeply interested in the preservation of both the golden and the bald eagle"); S. Rep. 1986, 87th Cong., 2d Sess. 6 (1962) (same); 108 Cong. Rec. 22272 (1962) (same).

To construe Indian treaties—made by and on behalf of entire tribes—as permitting an unrestricted right to hunt eagles and so to threaten those species with extinction would be to elevate the hunting rights of present day Indians over the religious and cultural rights of future generations of Indians and the interest of all citizens in the preservation of wildlife. It is not appropriate, in the name of preserving Indian hunting rights, to leave reservation Indians "free to destroy the subject of the power" (*Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916)).

2. This Court's *Puyallup* decisions confirm that Indian treaty rights do not extend to hunting a species to extinction. Although it is clear that a state has no power to abrogate Indian treaties, and consequently no power to restrict valid treaty rights (see, *e.g.*, *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337-338, 342 (1983); *Puyallup III*, 433 U.S. at 176 n.15), this Court in *Puyallup II* emphasized the inherent limitation on treaty hunting and fishing rights (414 U.S. at 44, 49 (1973)):

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular

> stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

The Court has indicated, moreover, that on-reservation fishing and hunting rights derived from a treaty with the United States are not absolute. See *Puyallup III*, 433 U.S. at 176 ("it would be decidedly unwise, if Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights"); see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 684-687.

The Court's conclusion that Indian fishing rights do not "persist down to the very last steelhead in the river" (*Puyallup II*, 414 U.S. at 49) was not, as the court below concluded (Pet. App. 19a), limited to the situation where the asserted right is shared by treaty with non-Indians. In *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 332 n.15, this Court explained that its *Puyallup* decisions were based in part upon the state's "interest in conserving a scarce, common resource." Eagles and other wildlife protected by the federal conservation statutes are precisely such a resource. The migratory nature of this wildlife gives the tribes, the states and the federal government a common interest in the conservation of the species. Each entity can frustrate the efforts of the others—specifically, the federal government cannot assure the conservation of a species such as the bald eagle if the tribes are not subject to regulation, since a tribe, because of a species' migratory nature, could cause its destruction. Compare *Missouri* v.

Holland, 252 U.S. 416 (1920); *Kennedy* v. *Becker*, 241 U.S. at 563.[24] This point is dramatically illustrated by this case, where the testimony shows that respondent shot the eagles along the Missouri River opposite a federal wildlife refuge established precisely in order to preserve the scarce nesting places of the eagle (see page 11, *supra*).

It is abundantly clear that non-Indians, as well as Indians, have an interest in avoiding the eradication of a scarce, common resource: eagles and other endangered species. The rationale of the *Puyallup* cases precludes the conclusion of the court below that Indian treaty rights are broad enough to provide a defense to reasonable, necessary, and non-discriminatory federal conservation statutes.[25]

II. THE BEPA AND THE ESA SUPERSEDE ANY INCONSISTENT TREATY RIGHTS TO TAKE EAGLES

Even if, contrary to our submission, this Court concludes that the 1858 Yankton Sioux Treaty could be interpreted as granting to treaty Indians an unfettered right to take eagles and other endangered species on the reservation, it is clear that this treaty right was at the least suspended by the BEPA and the ESA. It is well settled that, at least in the absence of pertinent treaty provisions or statutes to the contrary, federal laws of general applicability apply to Indians and their property interests. *FPC*

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[24] See note 35, *infra*.

[25] This case does not involve, and we accordingly do not here address, any question concerning the scope of a state's power to enforce a state statute designed to protect a species from extinction against hunting by Indians on their reservation.

v. *Tuscarora Indian Nation*, 362 U.S. 99, 116, 120-123 (1960).[26] General laws may also override contrary treaty and statutory provisions where Congress has demonstrated the necessary intent to abrogate or modify such provisions. *Menominee Tribe* v. *United States*, 391 U.S. at 413; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-566 (1903). We may assume, for purposes of this case, that an intent to limit Indian treaty rights must be clear from the face of the federal statute or its legislative history. See, *e.g.*, *Menominee Tribe* v. *United States*, 391 U.S. at 413 and cases there cited. But see *Rosebud Sioux Tribe* v. *Kniep*, 430 U.S. 584, 588 n.4 (1977), citing *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973); *United States* v. *Fryberg*, 622 F.2d 1010 (9th Cir.), cert. denied, 449 U.S. 1004 (1980). Both statutes here involved and their legislative histories amply meet that standard.

1. Both statutes, on their face, show that Congress considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statutes, and provided specific, narrow exceptions that precisely delineated the extent to which Indians would be permitted to continue to take the protected wildlife.

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[26] There is no assertion here of any treaty right to exclude non-Indians from the reservation. This case does not, therefore, involve any question of whether *Tuscarora* has been limited by *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), recognizing such a right to exclude as an attribute of tribal sovereignty in upholding a tribal power to tax non-Indians entering the reservation for commercial purposes. *Jicarilla*, of course, did not involve any federal statutory obligations. Compare *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116-1118 (9th Cir. 1985), with *Donovan* v. *Navajo Forest Products Industries*, 692 F.2d 709, 713-714 (10th Cir. 1982).

The BEPA empowers the Secretary to issue permits authorizing the taking of bald and golden eagles "for the religious purposes of Indian tribes,"[27] but only when he determines that such takings are compatible with the preservation of the species (16 U.S.C. 668a).[28]

The recognition of special Indian interests in the ESA is even narrower. The EAS's prohibitions apply to "any person subject to the jurisdiction of the United States" (16 U.S.C. 1538(a)(1)), and the definition of "person" does not exclude Indians (16 U.S.C. 1532(13)). Instead, the ESA contains a limited provision allowing any "Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" or any "non-native permanent resident of an Alaskan native village" to take an endangered species, but only if the taking is "primarily for subsistence purposes." 16 U.S.C. 1539(e)(1)(A) and (B). And even this subsistence taking may be restricted by regulation if the taking "materially and negatively affects" an endangered or threatened species. 16 U.S.C. 1539(e)(4).

Congress has thus focused on the effect of Indian hunting on the statutory objectives, and defined the

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[27] There is no merit to the suggestion of the court below (Pet. App. 21a) that the quoted language refers to takings by non-Indians for Indian religious purposes (see pages 27-28, *infra*).

[28] The Department of the Interior informs us that no permit authorizing the killing of an eagle for religious purposes has ever been issued. Instead, eagle parts are supplied to permittees for religious purposes out of the stock obtained from the recovery of dead eagles and their parts in the course of the enforcement of the Act. Cf. II Tr. 95 (no permit other than depredation permit (available under 16 U.S.C. 668a for golden eagles only) ever issued in Region 6 authorizing the killing of an eagle).

precise extent that Indians are to be permitted to take the protected wildlife; it simply defies common sense to assume that Congress also intended, sub silentio, to permit the continuation of a far broader general treaty right to on-reservation hunting of the newly-protected species. Thus, the implication of such a continuing right in the face of this express statutory language ignores the plain language of the statutes. This, of course, a court is not free to do. See, *e.g.*, *Maine* v. *Thiboutot*, 448 U.S. 1, 8 (1980); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945).

2. If there were any doubt on this score, it would be foreclosed by the legislative history of each Act.

a. The House report on the 1962 amendment to the BEPA specifically noted that the decline in the golden eagle population was due in part to the killing of these eagles by Indians:

> Certain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers, as well as to provide souvenirs for tourists in the Indian country.

H.R. Rep. 1450, 87th Cong., 2d Sess. 2 (1962).[29]

The Department of the Interior advocated adoption of the 1962 amendment to the BEPA, which included golden eagles within the purview of the Act, but only

[29] See *1962—Miscellaneous Fish and Wildlife Legislation: Hearings Before the Subcomm. on Fishery and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 15 (1962) (Fish and Wildlife Service testimony identifying "rather substantial market for eagle feathers mostly for Indian rituals [and] the tourist trade" as providing stimulus for killing). Accord, *id.* at 29, 39, 47.

if the Act was also amended to "permit the Secretary of the Interior, by regulation to allow the use of eagles for religious purposes by Indian tribes." Letter from Ass't Secretary of the Interior, *reprinted at* S. Rep. 1986, 87th Cong., 2d Sess. 5, 6 (1962); H.R. Rep. 1450, 87th Cong., 2d Sess. 3 (1962); 108 Cong. Rec. 22272 (1962). Congress acceded to this request by adding the limited "religious purposes" exception to the BEPA.

It is thus clear that Congress thought that the Bald Eagle Protection Act, as adopted in 1940 and as amended in 1962, fully applied to Indians, subject only to the special permit exemption for Indian religious ceremonies. *United States* v. *Fryberg*, 622 F.2d 1010, 1014-1015 (9th Cir.), cert. denied, 449 U.S. 1004 (1980).

The suggestion of the court below, quoting *United States* v. *White*, *supra*, that the "religious purposes" exception " 'is not limited to the taking of eagles by Indians or to the taking of eagles on Indian reservations' " (Pet. App. 21a) assumes that Congress could have deemed it appropriate to permit non-Indians to hunt eagles, on or off a reservation, in order for Indian tribes to obtain enough eagle parts for their religious purposes.[30] Nothing in the legislative history supports such a strained interpretation of the Act. Nowhere did Congress suggest in any way that this was its intent. The Department of the Interior, which advocated the exception in the first instance, never suggested this interpretation during the legislative process. Moreover, it has never subsequently construed the provision in this manner. Three months after adoption of the amendment, Interior

[30] See note 28, *supra*.

promulgated a regulation which authorized permits only "to those individual Indians who are authentic, bona fide practitioners of such religions." 28 Fed. Reg. 976 (1963). Present regulations require an applicant for such a permit to submit a certification from the Bureau of Indian Affairs that he is in fact an Indian. 50 C.F.R. 22.22(a)(5). Interior's contemporaneous and long-standing interpretation of the statute it is charged with administering is entitled to great deference. *United States* v. *Clark*, 454 U.S. 555, 565 (1982).

b. The legislative history of the Endangered Species Act of 1973 also clearly demonstrates that Congress intended its prohibitions to apply to Indians, except to the extent they were specifically exempted. In 1972, Congress considered, but did not pass, two companion bills submitted by the Administration that closely paralleled the bill it enacted in 1973. As proposed by the Department of the Interior, however, the 1972 bills (H.R. 13081, 92d Cong., 2d Sess.; S. 3199, 92d Cong., 2d Sess.) specifically exempted, in Section 5(a)(2), "American Indians, Aleuts, or Eskimos who take endangered species for their own consumption or ritual purposes in accordance with a treaty or pursuant to Executive Order or federal statute." [31] In Senate hearings on S. 3199, 92d Cong., 2d Sess. (1972) (the Administration bill) and S. 3818, 92d Cong., 2d Sess. (1972) (a similar bill to protect endangered species), a high ranking official of the Interior Department objected to the deletion in S. 3818 of the exemption for American Indians,

[31] Even this broad provision would not, of course, have authorized respondent's killing of eagles for sale to the undercover agents, since these killings were clearly not for his own consumption or for ritual purposes.

Aleuts and Eskimos and urged the Committee to "adopt language as found in section 5(a)(2) of S. 3199." *Endangered Species Conservation Act of 1972: Hearings on S. 249, S. 3199, and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 71 (1972). The Committee did not comply with this request.

In the House hearings on H.R. 13081,[32] subcommittee counsel questioned the desirability of the Section 5(a)(2) exception, remarking:

> That troubles me a great deal, because it occurs to me that we can find ourselves in a situation where if, say, the bald eagle were important to a tribe of Indians, and if they were, in fact, threatened with extinction, we could find ourselves in the position of presiding over the demise of that population or even species, certainly, in the long run, to the injury of the Indians.

Chairman Dingell agreed (*1972 House Hearings* 145, *supra* note 32). In response to a request by the Subcommittee about the need for, and effects of, such a broad exception, the Department of the Interior submitted a list of "[s]pecies that may be endangered on Indian Lands," and noted that "[a]lthough it is axiomatic that Congress may, by statute, extinguish treaty-secured hunting and fishing rights, it is equally clear that the courts do not lightly impute

[32] *Predatory Mammals and Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 144 (1972) (remarks of Rep. Potter) [hereinafter cited as *1972 House Hearings*].

to Acts of Congress an intention to extinguish these rights" (*id.* at 144 (citations omitted)).[33]

In the bill which became the ESA, Congress adopted a somewhat different approach. After considering testimony concerning the importance of the taking of bowhead whales to the subsistence economies of certain Alaskan native villages,[34] the Senate included the current exemption to permit the continuation of this taking, and that exemption was accepted by the Conference Committee. H.R. Conf. Rep. 93-740, 93d Cong., 1st Sess. 27-28 (1973). On the Senate floor, it was explained that the provision covered only the inhabitants of approximately seven villages along the northwest coast of Alaska. 119 Cong. Rec. 25677 (1973). Thus, the provision that in effect re-

[33] The Department accordingly suggested that if Congress wished to eliminate Indian treaty rights, it should do so "explicitly"—rather than "simply delet[ing]" Section 5(a)(2), it should "resolve the issue expressly by rewriting Section 5(a)(2)" (*1972 House Hearings* 144). This was, of course, simply drafting advice that the Congress was not obligated to follow. In any event, Section 5(a)(2) was not "simply delet[ed]." Nor was it rewritten, since the bill in which it was contained died when the 92d Congress adjourned. The important point, we submit, is that the legislative history shows that Congress was specifically aware of the effect of Indian treaty rights on the matter under consideration, and ultimately decided the precise extent to which Indian hunting of the protected species should be permitted.

[34] *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 126-127, 135 (1973). The Senate report noted that "the case of the Alaskan native Indians, Aleuts, and Eskimos required special attention [because those natives] depend on traditional hunting practices not only for sustenance but as a means for preserving social unity." S. Rep. 93-307, 93d Cong., 1st Sess. 5 (1973).

placed Section 5(a)(2) of the 1972 bills provides precisely for a much narrower exception. As this Court noted in *TVA* v. *Hill*, 437 U.S. at 188 (emphasis in original):

> In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, 16 U.S.C. § 1539 (1976 ed.), creates a number of limited "hardship exemptions," none of which would even remotely apply to [respondent]. In fact, there are no exemptions to the Endangered Species Act for [Indian treaty rights], meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only "hardship cases" Congress intended to exempt.

In sum, when considering each Act, Congress addressed the extent to which it should apply to Indians, and determined that Indians should be granted only very narrowly circumscribed exemptions from the statutory provisions. It is not the function of the courts to expand those exemptions. Where, as here, the intent of Congress is clear, a court is not free to ignore that intent, even where Indian treaty rights are involved. See *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), slip op. 12, 21.

3. The effect of unlimited Indian hunting on the endangered wildlife population could be very serious. Respondent estimated that he himself killed 20 eagles a year, and in fact he sold seven bald eagles to the agents in about two years. The peak eagle population at the Karl Mundt refuge, one of the largest wintering areas for the eagle, is only 120 birds (II Tr. 158-163). In addition, substantial numbers of the total

national population of a variety of other federally protected endangered and threatened species are within easy access of Indians who may wish to hunt them.[35] Congress was well aware of this risk. See *1972 House Hearings* 143-144 (Dep't of Interior supplies, in response to Committee request, a list of "native American species which could appear on our lists and which may occur in lands that are controlled by American Indians").

The United States contains more than 240 Indian reservations, with a population exceeding 750,000 Indians. Bureau of Indian Affairs, U.S. Dep't of Interior, *Local Estimates of Resident Indian Population and Labor Force Status: January 1983*, Tables 1, 3 (Indians Living on or Adjacent to Reservations). Many of the 431 National Wildlife Refuges within the United States are near reservations. Several, including the Karl Mundt Refuge, border on reservations or are separated from them only by rivers in

[35] In addition to the bald eagle, six other species of wildlife on the list of endangered and threatened species would be seriously affected: the grizzly bear, the gray wolf, the peregrine falcon, the black-footed ferret, the California condor, and the whooping crane. Memorandum from Acting Chief, Office of Endangered Species, to Chief, Division of Law Enforcement, U.S. Department of the Interior (Jan. 30, 1985). The risk is real. For example, a Florida state court recently dismissed a state prosecution against the Chairman of the Seminole Indian tribe for killing one of the some 30 remaining Florida panthers, on the theory that the state conservation laws do not extend to killings by Indians on their reservation. *State* v. *Billie*, No. 83-202 (Fla. Cir. Ct. June 28, 1985). The rationale of the instant decision would preclude a federal prosecution as well, leaving the reservation Indians totally free to destroy any of the few remaining panthers if they find them on their reservation. The Director of the Fish and Wildlife Service has informed us that approximately 15% of the panthers' known habitat is on Indian lands.

which the eagles and other wildlife live or seek fish or waterfowl.

Of course, commercially motivated takings, even on Indian reservations, remain at least theoretically subject to prosecution under the decision below.[36] Despite that restriction, however, the court's reading of the BEPA and the ESA would substantially impede the prosecution of Indian hunters of threatened and endangered species, thus increasing their incentive to take wildlife and hindering efforts to protect the various populations. Under that reading, the government would be required to prove either that the protected wildlife was not taken on the reservation—which might be difficult or impossible, particularly where a wildlife refuge borders the reservation[37]—or that it was taken for a commercial purpose. It is not clear that a subsequent sale of the wildlife would suffice to establish such commercial intent in the taking. Here, despite undisputed evidence that respondent sold the

[36] The court below concluded that commercial takings of eagles and other migratory birds were not protected because there was no evidence in this record that the Yankton Sioux had historically engaged in commercial trade in such wildlife (Pet. App. 9a n.10). Thus, on a different record, a court might conclude that there was a treaty right to take birds or other wildlife for commercial purposes (Pet. App. 9a n.11). See *Puyallup I*, 391 U.S. at 398; *Puyallup II*, 414 U.S. at 48; *Fishing Vessel*, 443 U.S. at 686-687.

[37] In the instant case, respondent admitted that he shot eagles along the Missouri river where it borders the wildlife refuge. On one occasion, he even told the agents he intended to go into the refuge, although the government was not able to obtain further proof to that effect. See page 11, *supra*. Unless an undercover agent (or perhaps another person) witnesses a taking, it will be nearly impossible for the government to prove whether a taking occurred on or off a reservation.

birds to the agents, the court refused to find a commercial taking as a matter of law, and instead remanded the takings counts for retrial "under proper instructions" (Pet. App. 22a-23a). Moreover, like problems might attend the enforcement of other federal conservation statutes. Congress, however, prescribed a more effective protection for the endangered wildlife that are our common heritage. This Court should restore fully the ability of the federal government to enforce these important laws.

CONCLUSION

The judgment of the court of appeals affirming the dismissal of Count 12 of the indictment and reversing respondent's convictions on Counts 8 and 10 should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

DWIGHT DION, SR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

(1) Whether the Bald Eagle Protection Act, 16 USC 668, or the Endangered Species Act of 1973, 16 USC 1538, abrogated the treaty right of Dwight Dion, Sr., to take five eagles.

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STATEMENT OF THE CASE

Dwight Dion, Sr., was indicted on May 18, 1983, in a multicount indictment charging him with selling fans that contained the feathers of protected birds and taking and selling eagles. This proceeding involves only the three counts of the indictment that charged Dwight Dion, Sr., with taking three bald eagles (Count VIII), one bald eagle (Count X), and one golden eagle (Count XII).

Three counts of the indictment charged Dion with selling the same eagles that he had in other counts been charged with taking. Count IX charged him with selling four bald eagles, including the three he was charged with taking in Count VIII, Count XI charged him with selling the bald eagle he was charged with taking in Count X. Count XIII charged him with selling the golden eagle he was indicted for taking in Count XII.

Of the three counts that charged him with taking, Count XII was dismissed by the District Court prior to trial on the basis of *United States* v. *White*, 508 F.2d 453 (8th Cir. 1974). Pet. App. 71a. Counts VIII and X after conviction were reversed by the Eighth Circuit in *United States* v. *Dion*. Pet. App. 1a.

Dion was convicted on all eight counts of the indictment that charged him with selling, including the three counts that charged him with selling the five eagles that he was also charged with taking. Those convictions have been affirmed by the Eighth Circuit and they are not before this Court.

There is no dispute that the five eagles Dion is charged with taking were taken and sold on the Yankton Indian Reservation. The District Court found that "(t)he undisputed evidence is that the taking was on the Yankton Sioux Reservation." Pet. App. 71a. Dion testified at a pretrial hearing that he took all the eagles on the Yankton

Sioux Indian Reservation. JA 28-29. The Eighth Circuit, relying upon the finding of the District Court, assumed as a matter of fact that the eagles were taken on the Yankton Sioux Indian Reservation. Pet. App. 6a. The record does not reflect that the United States has ever seriously argued that the five eagles at issue in this case were not taken on the Reservation.

Dwight Dion, Sr., is an enrolled member of the Yankton Sioux Tribe, and presently as well as at the time of the taking of the eagles, he and his wife and children reside on the Yankton Sioux Indian Reservation. At the trial, Agent Mauldin characterized Dwight Dion, Sr., and his family as being "poor" and "doing the best they could to get by." TT 66.[1] On one occasion, Dion told Agent Mauldin that he needed the money to "help save two of his calves." TT 67-68. The Eighth Circuit in *United States* v. *Dion*, Pet. App. 29a, noted:

> This reservation is located in a remote and desolate area of South Dakota, and is one of the most impoverished areas in the nation. The 1980 census reports that the 1979 per capita income on the Yankton Sioux Reservation was less than $2,500, and more than half of all families on the Reservation were below the poverty level.

Although there is evidence that the subject of whole eagles had been discussed on prior occasions, the first time that any transaction for the sale of a whole eagle came up was on August 7, 1982. Agents Mauldin and Standish brought the subject up with Dwight Dion. TT

[1] The trial commenced on September 20, 1983. JA 1. Where portions of the trial transcript have not been included in the joint appendix, reference to the trial will be designated as "TT" followed by the page number.

68, 169. There was no evidence that Dwight Dion sold eagles at any other times than set forth in the indictment except when he traded one to another tribal member. TT 75. Prior to the arrival of the Agents Mauldin and Standish on the Yankton Indian Reservation, there was no knowledge by community members that any eagles or eagle parts were being sold on the Reservation nor did Dwight Dion, Sr., have a reputation for selling eagles. TT 188-189. Dion testified at the September 6, 1983, motion hearing[2] at 157 that he had never sold eagles to anyone except the agents. The issue of entrapment was not raised on appeal. Dion did not testify at trial.

Dwight Dion, Sr., testified in pretrial proceedings on September 6 that he was a member of Native American Church, 134, as organized on the Yankton Indian Reservation. 147-148. The Yankton Chapter is separate from the national Native American Church with tenets that in the some respects do not coincide with the views of the national organization. 147. Dwight Dion, Sr., JA 22-25, as well as others, JA 17-19, offered testimony about the sacred nature and use of eagle parts in Native American religion.

Although not clarified, Dion implicitly represented to Agent Mauldin that the eagles he took were either for his own religious purposes or presumably for religious purposes of tribal members:

> Q. Did he talk anything about him killing eagles, why he killed eagles for other people?
>
> A. He went into this to some extent. He said that some of the clans in the tribe, their belief is such

[2] No part of the Sepember 6, 1983, transcript has been included in the joint appendix. It will be designated as the September 6 hearing followed by the relevant page number.

> that it prevented them from killing eagles. However, they could possess eagles or eagle parts and, as a result of this, they oftentimes had him do the killing because he was one of the better hunters around.

TT 36. In Exhibit 14 A at 23 of the September 6 hearing (Rec. 245; JA 72A), Dion said:

> I'll probably get half a dozen a year. Like right now, like me, I, I need, the one reason why I want a black tip is 'cause I want to use it in my church with my own, alter, you know.

The manager of the Karl Mundt National Wildlife Refuge testified at the September 6 hearing. He had been the manager since February of 1981. 159. Since that time, he had not noticed any unusual number of dead eagles in the Refuge, 173, and he could not estimate the losses from the time that he became manager to the time of the hearing. 173. He had never observed Dwight Dion, Sr., in the refuge. 168.

John Cooper, the Senior Resident Agent for the U.S. Fish and Wildlife Service and an expert on eagles, also testified at the September 6 hearing. He testified that the major reason the bald eagle had become diminished in numbers was because of destruction of natural habitat and environmental pollutants such as pesticides, pcb's, and DDT. 185. Additionally, Cooper testified that power lines associated with the Ft. Randall Dam, a major producer of power in the area located adjacent to the Karl Mundt Refuge, also caused the deaths of eagles. 186. Eagles perch on the power lines and get electrocuted or run into lines when hunting. 188.

The Eighth Circuit in *United States* v. *Dion*, Pet. App. 1a, affirming and refusing to overrule *United States* v. *White*, 508 F.2d 453 (8th Cir. 1974), held that Dwight

Dion, Sr., had the treaty right to take eagles for traditional, non-commercial purposes on the Yankton Indian Reservation where he is enrolled. Since the government had indicted Dion criminally, the Court held there must be an express reference in either the Acts themselves or their legislative histories that the treaty right to hunt eagles had been abrogated. It was specifically determined that this did not include the right to take eagles for commercial purposes or to sell them because there was no historical evidence that Indians sold whole or any parts of eagles. Indeed, the Court held that the United States is free to retry Dion on the three taking counts provided they show that the takings were for commercial purposes under proper instructions.

SUMMARY OF ARGUMENT

There is not an issue in the present case concerning whether Indians have the right under the Bald Eagle Protection Act or the Endangered Species Act to take eagles for commercial purposes. The Eighth Circuit held that they do not. Rather, the issue is whether Congress intended to abrogate the treaty right of the Yankton Sioux to hunt for traditional purposes. The Yankton Sioux did not understand that their right to hunt under the treaties would be qualified so that they could not hunt for traditional purposes. There is no evidence that Dwight Dion, Sr., The Yankton Sioux Tribe, or any other Indian has in the past or will in the future hunt eagles to extinction. This Court's Puyallup decisions deal with in-common and not exclusive hunting rights and cannot support an abrogation of treaty hunting rights.

Neither the Bald Eagle Protection Act nor the Endangered Species Act expressly and clearly, either on their face or in their legislative histories, reflect any intent to

abrogate hunting rights of the Yankton Sioux. Neither Act was passed because Indians were exercising their right to hunt under treaty on their reservations. Rather it is clear that Congress wanted to protect the right of Indians to take eagles as they had done prior to the passage of both Acts. Under the canons of construction dealing with abrogation of treaties it cannot be said that Indian hunting rights have been abrogated.

Dwight Dion, Sr., was convicted of selling the same eagles that he was charged with taking. It was not the intent of the Bald Eagle Protection Act, Endangered Species Act, or the Migratory Bird Protection Act to provide for multiple charges, especially under the facts of this case, revolving out of each single taking. The takings in this case have been merged with the convictions on selling.

The government asks this Court to reverse the emminently sound decision of the Eighth Circuit, a Court with great expertise in deciding treaty issues, on the basis of policy and emotion. Such arguments should be made to Congress.

ARGUMENT

I. DWIGHT DION, SR., HAS A TREATY RIGHT TO TAKE EAGLES.

Over the years in matters involving the interpretation and construction of Indian treaties such as present in this case, this Court, because of the vulnerability of the Indians at the time treaties were made, has established certain canons of construction that must be applied. Treaties must be liberally construed in favor of Indians. *Choctaw Nation* v. *Oklahoma*, 318 U.S. 423, 431-32 (1943); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912). Ambiguous expressions in treaties must be resolved in favor of Indians.

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Winters* v. *United States*, 207 U.S. 564, 576-77 (1908). Treaties should be construed as the Indians would have construed them. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631 (1970); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832).

Applying the above principles to the relevant treaties in this case, it is undisputed and not a matter of contention that Dwight Dion, Sr., an enrolled member of the Yankton Sioux Tribe, enjoys the right to hunt on the Yankton Indian Reservation. *Compare* Treaty of Ft. Laramie, Sept. 17, 1851, art. 5, 11 Stat. 749, *reprinted in* C. Kappler, *Indian Affairs—Law and Treaties* 595 (1904), reserving to the Yankton Sioux Tribe the right to hunt and fish *with* Treaty with the Yankton Sioux, Apr. 19, 1858, art. 4 and 11, 11 Stat. 743, where the Yankton Sioux Tribe ceded and relinquished all but 400,000 acres of land and acknowledged their dependence upon the government of the United States in return for the agreement of the United States to protect the Tribe in the quiet and peaceful possession of their person, property, and land. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968); *United States* v. *Winans*, 198 U.S. 371, 381 (1905). The United States agrees in this case and it is not disputed that the "right to hunt and fish are implicit in treaties setting aside land for use by Indians as a reservation," Pet. Br. 19, and that Dwight Dion, Sr., has the right to hunt on the Yankton Indian Reservation.

II. A TREATY RIGHT TO HUNT CANNOT BE ABROGATED BY AN ACT OF CONGRESS UNLESS THE INTENT OF CONGRESS TO ABROGATE IS CLEAR AND EXPRESS.

The Yankton Sioux Tribe paid no small price for the reservation that was set aside for their exclusive use and

benefit. While essentially being ignorant of the white man's ways and a ward of the United States, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Tribe while at the mercy of the United States' "superior negotiating skills and superior knowledge of the language in which . . . (treaties were) recorded," *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979), gave to this country thousands and thousands of acres of land in return for their permanent home and the protection of the United States. The Yankton Sioux Tribe reserves all hunting and other essential rights under the treaties. *United States* v. *Winans*, 198 U.S. 371, 381 (1905); *Winters* v. *United States*, 207 U.S. 564, 576-77 (1908). A treaty being a contract, *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979), the parties clearly did not comprehend that it was to be broken. Indeed, the United States because of its trust relationship with Indian tribes has a special responsibility to see that the terms of treaties are carried out. *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942). As Justice Black said in his dissent in *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960), "great nations, like great men, should keep their word."

The extreme reluctance of this Court to hold that an act of Congress violates a treaty has led to a number of other special rules concerning construction of Indian treaties. For example, early on in *The Leavenworth, Lawrence, and Galveston Railroad Company* v. *United States*, 92 S.Ct. 733, 741-42 (1876), where the issue was whether a statutory grant included treaty lands, it was determined that "there must be an express declaration to that effect" and otherwise "the presumption is conclusive that Congress never meant to grant it." In *United States* v. *Santa Fe Pacific Railroad Company*, 314 U.S. 339 (1941), where the United States sued to protect Indian occupancy of

lands, the Court held that Indian title had never been extinguished because there was no showing that Congress had expressed a "clear and plain" intention to extinguish the Tribes' right. Id. 354.

The same special rules of construction have been followed in cases involving the contention that a later general congressional act abrogated an earlier treaty right. For example, in *Choate* v. *Trapp*, 224 U.S. 665, 667-76 (1912), where it was contended that an act of Congress allowed a state to tax Indian allotments, the Court held that doubtful expressions in the statute must be "resolved in favor of" the Indians. Later in *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956), the issue was whether the later enacted capital gains provisions of the Internal Revenue Code could be applied to income generated from trust property because of the earlier enacted General Allotment Act which required property to be given to Indians free of liens. Although the government argued that the income tax could be levied even though no lien could be imposed, the Court held that it could not agree that the "taxability of respondents in these circumstances is unaffected by the treaty. . . ." A more recent case, *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968), involved the question whether a termination statute enacted by Congress nullified treaty rights of tribal members to hunt and fish on the reservation free from state regulation. The Court emphasized that the termination Act contained no "explicit statement" abrogating the hunting and fishing rights, and that such an intention would not be "lightly imputed" to Congress. *Menominee* was expressly reaffirmed in *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), where the Court stated that "(a)bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of

treaty rights. . . ." *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64-65 (1978); *Bryan* v. *Itasca County*, 426 U.S. 373, 392-393 (1976); and *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 672-73 (1974).

The reluctance to abrogate treaty hunting rights was dealt with by both the Department of Interior and the courts shortly after the Bald Eagle Protection Act was enacted. In *United States* v. *Cutler*, 37 F.Supp. 724, 725 (D. Ida. 1941), where the question presented was whether the Migratory Bird Treaty Act abrogated the right of an Indian to take a wild duck pursuant to a treaty, the Court held that the treaty "had not been modified, expressly, and in plain words" and that "grants by them should be regarded '*strictissimi juris*' and all uncertainties resolved in their favor." A year later, Solicitor Nathan Margold of the Department of Interior wrote an opinion on whether an Indian could be prosecuted for killing a migratory bird on the Yakima Indian Reservation under regulations enforcing the Migratory Bird Treaty with Great Britain. In holding that the prosecution would violate the Yakima Indians' right to hunt, he stated:

> While it is established that Congress has the right to violate treaty obligations the converse of this rule is that an intent to do so will be found only where the language of the legislation leaves no room for any other possible construction.
>
> 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'
>
> *Cook* v. *United States*, 288 U.S. 102, 120 (1933).

1942 Opinions of the Solicitor, pp. 1090-1091. He held further that even though the Migratory Bird Treaty provided some exceptions for Indians, those exceptions

applied to all Indians and there was no reason to hold that Congress intended the treaty to limit rights guaranteed by specific treaties with the Indians. If the treaty with Great Britain required a limitation on Indian hunting rights, he stated that fact should first be determined and then be negotiated with the Indians to see if a voluntary resolution of the conflicting obligations could be created. In the absence of such voluntary solution, Congress should state in new legislation which of the two conflicting treaty obligations should be violated and which should be enforced.

In conclusion, a number of cases had been decided before Congress enacted either of the Acts here which the government maintains abrogated Dion's right to hunt eagles. Indeed, *Cutler* and the Margold opinion show the law at the time that Congress enacted the laws and the understandings that Congress obviously had of the specificity needed if it was going to restrict Indian treaty hunting rights. It should also be kept in mind that the Eagle Protection Act was passed shortly after the enactment of the Indian Reorganization Act which strongly reaffirmed Indian rights. Act of June 18, 1934, c. 576, 48 Stat. 987. Had Congress wished to terminate Indian treaty rights under either of the Acts, it would have discussed the subject in debate and would have expressly and clearly reflected its intention either in the language of the Acts or in their legislative history.

The government makes a number of arguments in support of their position that Indians in general, and Dwight Dion, Sr., in particular, do not have the right to hunt eagles to extinction. A close analysis of the government's arguments reveals the unsoundness of their position.

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), involved a case involving the right of Indian tribes

to try non-Indians in tribal courts. Contrary to the case here, where Indian hunting rights are profoundly significant and have been exercised by the Tribes from time immemorial, jurisdiction over non-Indians had never been exercised by the Tribes. 435 U.S. 197. There was no affirmative right in any treaty, unlike the situation here, to try non-Indians; to the contrary, the treaties suggested that there was no jurisdiction over non-Indians. The one case squarely dealing with the issue had been decided adversely to the tribal position. Congress consistently believed that tribal courts had no jurisdiction over non-Indians. It was not surprising, then, that the "common notion of the day and assumption of those who drafted" the treaties at issue in that case was that tribal courts had no jurisdiction over non-Indians.

New York ex rel. Kennedy v. *Becker*, 241 U.S. 556 (1916), involved a state conservation law prohibiting the taking of fish without a permit that was held to apply to Indians who held a nonexclusive, in-common right to fish on non-reservation lands. While the precedential value of the case is negligible in view of this Court's subsequent holdings in *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Puyallup Tribe* v. *Washington Game Dept.*, 391 U.S. 392 (1968) (Puyallup I); *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II); and *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165 (1977) (Puyallup III), it is also true, as pointed out in *United States* v. *Dion*, Pet. App. 19a, that the case was decided on the fact that the Indians understood that the State retained the right to regulate the fishing.

> But the *existence of the sovereignty of the State was well understood*, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. *We do not think that it is a*

> *proper construction of the reservation in the conveyance to regard it as an attempt* either to reserve sovereign prerogative or *so to [sic] divide the inherent power of preservation as to make its competent exercise impossible.* Rather are we [sic] of the opinion *the clause is fully satisfied by considering it a reservation of a privilege* of fishing and hunting upon the granted lands *in common with the grantees*, and others to whom the privilege might be extended, *but subject nevertheless to that necessary power of appropriate regulation*, as to all those privileged, which inhered in the sovereignty *of the State over the lands where the privilege was exercised.*

New York ex rel. Kennedy v. *Becker, supra* at 363-64. The Court specifically stated that it was not considering the right to hunt on land within the reservation. Its holding simply has no applicability to the case of Dion who was exercising his exclusive treaty right to hunt within his own reservation.

Washington v. *Fishing Vessel Ass'n., supra*, and *Puyallup I, II and III, supra*, all involved as well the right of Indians to exercise their now-exclusive, in-common right to fish on lands that were no longer part of their reservation under treaty language that gave them the right to fish at their usual and accustomed places. Each of these cases upheld the right of Indians to fish though the State was attempting to regulate that fishing on the basis of conservation.

At issue in each of the cases was the manner in which the fish were to be apportioned between the Indians and non-Indians, both of whom had a treaty right to take the fish. The statements cited by the government from *Puyallup II and III* in support of their position here, i.e., that Indians do not have the right to "pursue" the last

living steelhead[3] and to "untrammeled on-reservation fishing rights," Pet. Br. 22, are statements made by the Court pointing out that the Indians could not deprive the non-Indians of their valid share of the fish by taking all the fish as they passed through the reservation. On-reservation fishing was to be considered in allocating the fish between Indians and non-Indians. Read in this context, it is clear that the cases do not stand for the proposition, as urged by the government, that Dwight Dion's treaty right to hunt can be abrogated or even limited by the United States in the name of conservation. Rather, as noted by Eighth Circuit, the cases stand for the proposition, as understood by the Indians, that in-common treaty rights were to be subject to conservation regulation.

New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 n.15 (1983), does not aid the government's case. This Court noted there "that in exceptional circumstances" a State may assert jurisdiction over the on-reservation activities of tribal members' citing *Puyallup III*. This Court pointed out, however, that *Puyallup III* rested upon the fact that the lands involved did not belong to the Tribe, that the reservation fishing rights were in-common rights, and that the State had an interest in conserving a "common" resource. Thus *Mescalero* does not imbue the Puyallup trilogy with any greater weight than they are entitled to standing on their own.

Dwight Dion, Sr., was exercising an exclusive, and not in-common, right to hunt on the Yankton Sioux Indian Reservation. The Yankton Sioux would not have understood the treaty, as pointed out by the Eighth Circuit, as permitting other sovereigns to regulate their exclusive

[3] The Eighth Circuit below determined that this statement was dicta. Pet. App. 18a n.14.

on-reservation treaty hunting rights. Pet. App. 19a. The government has cited no authority in the treaties or their history to show that the Yankton Sioux understood that their treaty hunting rights could be limited. Neither *Washington* nor the *Puyallup* trilogy provide an alternate way to abrogate treaty rights. Therefore, as further pointed out by the Eighth Circuit, "the exclusive on-reservation treaty hunting rights of the Yankton Sioux are not subject to conservation regulations unless statutory abrogation of those rights has been effectuated." *Id.*

In construing statutes in this case, the Court should not be unmindful that in 1978 Congress passed the American Indian Religious Freedom Act, 42 USC 1996, hereinafter AIRFA. It is clear from the Act that Congress meant to ensure that laws, such as the ones here, that were enacted for worthwhile purposes should not be construed to infringe upon the right of Indians to practice their traditional religion. In *Frank* v. *State of Alaska*, 604 P.2d 668, 1073-74 n.9 (Ala. 1979), it was held that the AIRFA "was motivated by . . . laws such as those seeking to preserve endangered species." The government, then, has an even greater burden to overcome in order to establish that the treaty right to hunt for traditional purposes has been abrogated by the Bald Eagle Protection Act and the Endangered Species Act. *See* Amicus Brief of the National Congress of American Indians, *et al.*, at 13-16.

The government makes an emotional argument that the Yankton Sioux do not have a not have a treaty right to hunt a species to extinction. First of all, there is no evidence in this record that Dwight Dion, Sr., or any other Yankton Sioux member has hunted the eagle to extinction on the Yankton Sioux Indian Reservation. The manager of the Karl Mundt Wildlife Refuge indicated that there was no unusual number of dead eagles around the refuge. He

was unable to estimate any kind of loss from 1981 to 1983. *See* page 4, *supra*. Destruction of natural habitat, environmental pollutants, and power lines were said to be the primary causes of eagle deaths. *Id.* Secondly, neither the Yankton Indian Reservation nor any other reservation sufficiently controls eagles to permit them to render the eagle extinct. The eagle population in South Dakota is migratory and not a breeding or permanent population. September 6 hearing at 190. There is no threat of eagles being hunted to extinction under the Eighth Circuit holding or any other circumstance. Thus, as the Eighth Circuit indicated:

> The government has not established or even claimed that the eagle will become extinct if Indians are permitted to take eagles within the scope of their treaty rights. This court is not confronted with the problem of the imminent extinction of a species. Congress may still act if it chooses to do so.

Pet. App. 18a n.14.

Contrary to the argument of the government, Pet. Br. 17 n.21, Congress has never found the golden eagle to be threatened.[4] It is not listed or protected as endangered under the Endangered Species Act, hereinafter the ESA, September 6 hearing at 187, and was included in the Bald Eagle Protection Act, hereinafter the BEPA, to ease the government's burden of proof since bald eagles were often

[4] *See* 1962—Miscellaneous Fish and Wildlife Legislation: Hearings on H.R. Res. 487 before the Subcommittee on Fishery and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 87th Cong., 2nd Sess. 2 (1962) (Department of Interior testimony indicating that "we cannot state . . . that the golden eagle has reached the stage of an endangered species.") (hereinafter referred to as 1962 House Hearing).

confused with golden eagles.[5] The bald eagle, on the other hand, is endangered in South Dakota, but not in Minnesota where it breeds. September 6 hearing at 183.

III. THE BEPA AND ESA DO NOT SHOW THAT CONGRESS EXPRESSLY AND CLEARLY INTENDED TO LIMIT THE RIGHT OF INDIANS TO TAKE EAGLES FOR NONCOMMERCIAL PURPOSES.

A. Bald Eagle Protection Act, 16 U.S.C. 668.

1. 1940 Amendments.

When the BEPA was first passed in 1940, there was not one mention on its face or in its legislative history about its applicability to Indians. There was no mention of Indians in any respect or of Indian treaties, not alone whether or not the treaties were intended to be abrogated by the Act.[6] H. Rep. No. 2104, 76th Cong., 3rd Sess. (1940); S. Rep. 1494, 76 Cong., 3rd Sess. (1940). For over 22 years between the time it was passed until it was amended, respondent is unable to find and the government has not cited any reported case where an Indian was prosecuted for taking an eagle for any purpose. There can be no question but that the Act as passed in 1940 did not abrogate the treaty right of Dwight Dion to take eagles.

[5] *See* 1962 House Hearing, 6 ("So long as the golden eagle is fair game, the bald eagle is endangered as well.")

[6] The government does not contest the Eighth Circuit's holding that in order to find that the BEPA or ESA abrogated Indian treaty rights, it must be shown that their statutory language or legislative history "expressly state that Indian treaty rights were to be abrogated." *Compare* Pet. App. 11a-13a *with* Pet. Br. 24. This holding by the Eighth Circuit was based upon *Menominee Tribe* v. *United States*, 391 U.S. 404, 412-413 (1968), and *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), as well as the fact that a criminal prosecution is involved.

2. 1962 Amendments.

In 1962, amendments were made to the Act in order to add the golden eagle to the Act's coverage and to increase penalties. Even though the Department of Interior could not state that the golden eagle was endangered, it was apparent that until a bald eagle reached 3 or 4 years of age it was impossible for the untrained eye to distinguish the golden eagle from the bald eagle. Golden eagles being previously unprotected, bald eagles were killed under the assumption that they were golden eagles. 1962 House Hearing, 6.

Extensive hearings were held on the amendments. *See* Protection for the Golden Eagle, Hearing on S.J. Res. 105 and H.J. Res. 489 before a Senate Subcomm. on Commerce, 87 Cong., 2nd Sess. (1962) (hereinafter cited as 1962 Senate Hearing). The hearings did not focus on Indian issues, but rather on whether eagles were predatory and the wholesale slaughter of eagles in Texas. 1962 House Hearing, 12-16; 1962 Senate Hearing, 13-22, 75-85. It does not appear that any Indians or Indian organizations were advised of or participated in the hearings in any manner.

During the hearings and other legislative activities on the amendments, there were no facts presented that the taking of eagles by Indians or their use of eagle feathers in any manner contributed to the endangerment of either the bald or golden eagle. The references to Indians mainly concerned the willingness of those people involved in tourism to purchase eagle feathers for resale in curio shops.[7]

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[7] The government, quite inaccurately, argues that the legislative history of the 1962 amendments shows that Indians were killing eagles. Pet. Br. 26 n.29. None of the citations by the government reflect that fact. H.R. Rep. 1450, 87 Cong., 2d Sess. 2 (1962), says not

For example, the National Audubon Society presented a statement through its President which said:

> Moreover, the intentional slaughter of golden eagles and the accidental killing of bald eagles is encouraged by a growing, commercial trade in eagle feathers. The wings and feathers are retailed by mail order throughout the nation and in over the counter trade, particularly in the Southwest, to craft-hobbyists and souvenir hunters. Many of them go into pseudo-Indian headresses which are sold to the tourist trade.

1962 House Hearing, 29. By further example, in a letter from John Alderman to the Committee, it was stated that "(t)he feathers are used primarily for making Indian headresses for sale to tourists in curio shops throughout the West and Southwest." Id. at 47. That Indians were not participating in the commercialism of eagle feathers even as late as 1972 is made clear by the following exchange between Nathaniel Reed, Assistant Secretary for Fish, Wildlife, and Parks and Congressman Everett before the Subcommittee on Fisheries and Wildlife Conservation:

> Q. Mr. Everett: Do you have any evidence that the Indians are using these feathers for commercial purposes?
>
> A. Mr. Reed: No, sir.

Fish and Wildlife Legislation: Hearings on H.R. 697, 9754 and 10384 before the Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries, 92 Cong., 1st Sess. 88 (1972).

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that Indians killed eagles, but that eagles in some instances were killed to provide eagles for them. None of the other citations support the government's assertion either. Rather they support the fact that non-Indians were shooting the eagles.

At no time during the hearings or other legislative proceedings on the 1962 amendments was there ever any mention of Indian treaties or the necessity of impairing Indian treaty or religious rights. There is no discussion of limiting Indian treaty, reservation, or religious rights in either the House Report, Senate Report, or the floor debate in both the House and Senate. *See* H.R. Rep. No. 1450, 87th Cong., 2nd Sess. (1962); S. Rep. No. 1986, 87th Cong., 2nd Sess. (1962); 108 Cong. Rec. 5510 (1962). In no sense of the word can it be argued that the legislative history of the 1962 amendments indicates either expressly or clearly that the Indian right to take eagles was to be abrogated.

During the hearings before the House Committee on Merchant Marines and Fisheries, the Department of Interior pointed out in a letter from the Assistant Secretary Briggs that both the bald and golden eagle were of "deep religious or emotional significance" to Indians.

> Among the many birds held in superstitious and appreciative regard by the aborigines of North America, the eagle, by reason of its majestic, solitary, and mysterious nature, became the special object of worship. This is expressed in the employment of the eagle by the Indian for religious and esthetic purpose only.
>
> The mythology of almost every tribe is replete with eagle beings, and the widespread thunderbird relates in some cases to the eagles.

1962 House Hearing, 3. The Department recommended, without *conditioning* its support of the amendments, that if the 1962 amendments were enacted it should be authorized to permit Indians to use eagles for religious purposes.[8] *Id.* While making this recommendation, the policy of the Department was that:

> [A] treaty Indian is not subject to the Migratory Bird Treaty Act while on his own Indian reservation. The same is true, by analogy, of the Bald Eagle Act. While they remain on their reserved land, your Bureau is without authority to prevent Indians from taking and possession protected migratory birds.

Memorandum from the Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., to the Director of the Bureau of Sport Fisheries and Wildlife, dated April 26, 1962. *United States* v. *White*, 508 F.2d 453, 358 (8th Cir. 1974).

The recommendation of the Department of Interior was subsequently enacted and became a permanent part of the BEPA. It became a part of the BEPA not because it was the intent of Congress to abrogate the right of Indians to take eagles for traditional purposes, but because of the recommendation of Interior that the treaty right to use eagles for traditional purposes needed to continue into the future, as it obviously had from 1940, the year the BEPA was originally enacted, to the time of the 1962

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[8] There is evidence that, except for the sales involved in this case, Dion's takings in the past had been for his own religious purposes or the religious purposes of other Indians. *See* Page 4, *supra*. Dion is a member of the local Native American Church. The eagle is a profound part of Native American religious rites. To require an Indian to secure a permit to take eagles is invalid under the First Amendment, especially in light of the fact that the golden eagle is not endangered and there has been no showing that Indian religious takings would threaten either species. *See* 42 USC 1996; *Schneider* v. *Town of Irvington*, 308 U.S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Sherbert* v. *Verner*, 374 U.S. 398 (1971).

amendment. There was nothing said in the letter about abrogating Indian hunting rights. 1962 House Hearing, 3. It is clear from the legislative history that Congress intended and presumed that Indians would continue to take eagles under their treaty rights as they had in the past. Protection, rather than abrogation, of Indian treaty and religious rights was the hallmark of the 1962 amendments. There is absolutely no indication that the policy toward Indian takings was to be any different after 1962 than at the time of enactment of the BEPA in 1940, when no one can deny that Indian treaty right to take eagles was left untouched.

The fact that Interior was to permit Indians to *take*, in addition to possess and transport, eagles is not inconsistent but consistent with the continued existence of the right of Indians to take eagles pursuant to their treaty rights. There is nothing in the history of the 1962 amendments to indicate that Interior was to ever impede the right of Indians to take eagles as they had historically done in the past. Substantive regulations in any respect were never discussed. Certainly Congress in 1962 would have deemed any impediment by Interior of the Indian right to take eagles under treaty rights to be unlawful, even if an agency possessed the right to abrogate treaty rights which it does not. Any abrogation of the right to take golden eagles, which were not in danger of extinction, and indeed are not even endangered under the ESA, would have given rise to a taking claim under the Fifth Amendment. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968).

The government contends, despite what has been said so far, that the provision in the BEPA allowing Interior to permit Indians to take eagles is an indication that Indian treaty rights to take eagles were limited. However, as

pointed out by the Eighth Circuit below: "The religious purpose exception is not limited to the taking of eagles by Indians or to the taking of eagles on Indian reservations. In other words, it could have been deemed necessary to permit non-Indians to hunt eagles, on or off a reservation, in order for the tribes to obtain enough eagles for their religious needs." Pet. App. 21a. Moreover, as previously pointed out, it was the position of Interior in 1962 that Indians could not be prevented from taking eagles on their reservations.[9] Thus, it was necessary to secure a permit only when an Indian proposed to take an eagle outside of his reservation. The government's reliance, then, on Interior's contemporaneous interpretation is misplaced.

The preceding rationale of the Eighth Circuit, contrary to the government's argument that the interpretation is strained, has solid factual support in the legislative history of the amendments. Although respondent has not been able to find one solitary instance where facts were presented to show that eagles were being killed by Indian people, there are references in the record to non-Indians taking eagles for sale to Indians. For example, the U.S. Fish and Wildlife Service in testimony on the amendments indicated in a letter:

> Hunters other than from airplanes may be stimulated by the rather substantial market for eagle feathers, mostly for Indian rituals, the tourists trade, and occasionally for use by Scout troops.

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[9] None of the tribes mentioned in the Department's letter are treaty tribes, i.e. Hopi and Pueblos. It is not clear that their use of eagle feathers is protected. *See People* v. *Woody*, 61 Cal.2d 716, 40 Cal. Rptr. 69 (1964). The permit would make it possible for them to use eagle feathers if there was any question on the issue.

1962 House Hearing, 15. The Congressional debates also make explicit reference to non-Indians hunting eagles for sale to Indians:

> The most destructive is probably the second group of people who kill these birds for profit.
>
> Here light planes are used and the commercial shooters are equipped with high power shotguns. The birds simply have no chance. The word 'sportsmen' would be a misnomer if applied to these people. There is a profit motive. *The sale of feathers to dealers, curio shops, and Indian tribes has become a lucrative business.*

108 Cong. Rec. 5511 (remarks of Representative Goodling).

B. Endangered Species Act, 16 U.S.C. 1531-1543.

The Endangered Species Act of 1973 was preceded by two other Acts designed to preserve and protect endangered species. *See* P.L. 89-669, 80 Stat. 926; P.L. 91-135, 83 Stat. 276. The 1973 Act that was enacted into law was to provide for conservation, protection, and propogation of fish and wildlife. S. Rep. No. 93-307, 93rd Cong., 2nd Sess. 2989 (1973).

It was certainly incumbent on Congress under the law[10] dealing with abrogation of treaties to deal specifically with the issue of whether or not the Act abrogated the right of Indians to hunt pursuant to treaty rights, if they desired to abrogate these rights, in view of *United States* v. *Cutler*, 37 F.Supp. 724 (D. Ida. 1941), that had been in existence for 32 years construing an analogous

[10] Congress obviously knew how to abrogate Indian rights. *See Mattz* v. *Arnett*, 412 U.S. 481 at n.23 (1973) ("Smith River Reservation is hereby discontinued").

statute. Congress had not at any time between 1941 and 1973 ever expressed disapproval of the holding in *Cutler*. This apparent approval by Congress of the *Cutler* holding supports the view that it had adopted the *Cutler* interpretation that the federal government had no jurisdiction to prosecute Indians for statutory violations infringing upon Indian treaty hunting rights. *See United States* v. *Elgin, J. & E.R. Co.*, 298 U.S. 492, 500 (1935).

There were numerous bills dealing with endangered species both in the 92nd and 93rd Congress. However, the 1973 Endangered Species Act evolved from S. 1592, known as the Magnuson Bill, and S. 1983, known as the Williams Bill, both of which were before the 93rd Congress. Neither bill had any reference to Indians. The basic difference between the bills was that the Magnuson Bill was limited to fauna, while the Williams Bill covered both flora and fauna.

The hearings on the bills basically dealt with state versus federal power, extent of coverage over flora and fauna, and the international trade in endangered species. There was no discussion during the hearings of treaties, reservation self-government, or religious rights of Indians. Hearings on S. 1592 and S. 1983 before the Subcomm. on Environment of the Senate Comm. on Commerce, 93 Cong., 1st Sess. (1973) (hereinafter cited as 1973 Senate Hearings).

During the Senate Hearings, there was concern expressed by Senator Stevens as well as representatives of Alaskan Indians and Natives about the affect the bill would have on their ability to engage in traditional activities that involved the killing of certain wildlife that might be encompassed under the Act. 1973 Senate Hearings, 72, 126, 134. As a result, the Senate bill contained

provisions for the exemption of Alaskan Indians from the provisions of the Act. However, the House bill did not. Neither during the Senate or House Hearings was there ever any mention of Indians or Indian Treaty or hunting rights in the lower 48 states nor was there any testimony presented by any Indians or Indian organizations from the lower 48 states.

In 1971, Congress had passed the Alaska Native Claims Settlement Act, 43 U.S.C. 1601-1628. 43 U.S.C. 1603 provides as follows:

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and *including any aboriginal hunting or fishing rights that may exist are hereby extinguished.*

Emphasis added. Additionally, there was to be essentially no reserves after the passage of the Act. *See* 43 U.S.C. 1618(a). Thus, it was clear after the passage of the Settlement Act that Alaskan Natives had no hunting or fishing rights that they could assert against any attempted application of the ESA.[11] This was not so, however, for Indians in the lower 48 states, who, unlike Alaskan Indians, by and large were protected in their hunting and fishing by treaties. Without some protection from the ESA, it was clear that the hunting and fishing rights of most Alaskan Natives would go unprotected against the application of the ESA.

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[11] No treaties had ever been entered into with Alaskan Natives and no attempt had been made to establish reservations for them. Few reservations were ever established. As early as 1886 it had been said that the principle of Indian sovereignty did not apply to them. *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 50-51 (1962). *See* Cohen, Handbook of Federal Indian Law 739-758 (1982 ed.).

As a consequence of the situation of Alaskan Natives, an exception to the Act was provided for both native and non-native Alaskans with specific reference to the definition of native in "the recent Alaska Native Land Settlement Act." H.R. Rep. No. 740, 93rd Cong., 1st sess. 1973. The conference report indicated that "(i)t became apparent to the Committee in hearings that the case of the Alaska Native Indians, Aleuts, and Eskimos required special attention." S. Rep. No. 93-307, 93rd Cong., 1st Sess. 2993 (1973). There was no mention in the Act as finally passed about indians in the lower 48 states or their hunting and fishing rights undoubtedly because the rule was well settled that tribes enjoyed the right to hunt unless clearly abrogated by Congress. *Antoine* v. *Washington*, 420 U.S. 194 (1975).

Congress was well aware of the manner in which it was required to abrogate Indian hunting rights. They were advised by the Department of Interior. Pet. Br. 29-30. The Department advised that if an abrogation of treaty rights was to be effective, Congress must state so "specifically." Pet. Br. 30 n.33. Indeed, Senator Stevens, who was significantly involved in the hearings and debate on the ESA, said: "I think I am a pretty good lawyer. I know my State wants this bill, but I want it to be effective and I don't want to have to spend the next 5 years of my life arguing as to whether they are right or you are right on a particular species." 1973 Senate Hearings, 57. It is clear that the treaty hunting right of Dwight Dion, Sr., was not abrogated by the ESA.

The government urges the Court to take into account the fact that two bills had been introduced into the 92nd Congress one of which contained an express exemption from the ESA for Indians to take endangered species for their own consumption or ritual purposes in accordance

with treaties and one of which did not.[12] Although there was discussion about Indian treaty rights during consideration of the bills, neither one was passed by the House or Senate and both died when the 92nd Congress adjourned.

Respondent submits that the failure of the 92nd Congress to take any action on either bill which consequently caused both to die is of no significance with the respect to the intent of the 93rd Congress. The intent of Congress is indicated by its actions, and not by its failure to act. *See United States* v. *Price*, 361 U.S. 304, 312 (1960). Unsuccessful attempts at legislation are not the best guides of legislative intent. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981). Moreover, no weight should be given to the bills introduced into the 92nd Congress because it is impossible to ascertain the intent of the 93rd Congress from what the 92nd Congress failed to do or vice versa. *Consumer Product Safety Comm'n.* v. *GTE Sylvania*, 417 U.S. 102, 117-118 (1980). Lastly, the remarks of subcommittee counsel, Pet. Br., 29, are not helpful in determining whether or not it was the intent of anyone to abrogate Indian treaty rights even if the remarks could rise above the principle that comments by those in opposition to legislation are entitled to little or no weight. *See Holtzman* v. *Schleisinger*, 414 U.S. 1, 6 n.13 (1976).

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[12] Congress most recently considered the question of whether or not the ESA should be amended so as to apply to Indian treaty tribes. Hearings before the Subcomm. on Fisheries and Wildlife, Conservation and the Environment of the House Comm. on Merchant Marines and Fisheries, 99th Cong., 1st Sess. 311 (1985) (hereafter ESA Authorization Hearing). The ESA was reauthorized without making it applicable to tribes. Congress was aware of the pendency of this suit.

It takes a huge dose of speculation and conjecture to draw the conclusion that, because one subcommittee of Congress failed to include an exemption for Indians in a proposed bill, the subsequent Congress by not including a similar exemption intended to abrogate Indian hunting rights. The Eighth Circuit rejected such suggestion:

> We reject such a "backhanded" way of abrogating treaty hunting rights of Indians, especially in criminal cases. Failure to pass a bill creating a specific exemption for American Indians does not show that Congress expressly intended that the Act would abrogate Indian treaty hunting rights. If Congress wishes to do so it should speak accordingly.

Pet. App. 20a. Moreover, a logical and plausible explanation for the failure to adopt the Department's view is, as pointed out by the Eighth Circuit below, Pet. App. 22a, that the Committee "concluded that American Indians are not subject to the Act to the extent they are acting within the purview of a treaty, and that greater protection from the Act was not necessary." *See Solem* v. *Bartlett*, 460 U.S. 1035, 104 S.Ct.1161, 1169 n.17 (1984); *Carey* v. *Donohue*, 240 U.S. 430, 436 (1916).

There can be no doubt the ESA has broad coverage and a number of exceptions. However, there is no language in the statute itself which says that Indian treaties were to be abrogated nor is there any such language in the legislative history. That Indian hunting and fishing rights in the lower 48 states were not included in any exception does not mean that Indian hunting rights were to be abrogated.

The government's argument for abrogation is based on emotion. They point out that Dion had admitted, according to an undercover agent, that he had taken 20 eagles per year. However, they ignore his tape recorded con-

versation in which he said that he took no more than six presumably for religious purposes. *See* page 4, *supra*. They fail to point out that although the Yankton Indian Reservation is adjacent to the Karl Mundt National Refuge, the refuge manager had not noticed any unusual decrease in the eagle population. *See* page 4, *supra*.

Neither emotion, policy, speculation or conjecture is sufficient to abrogate a treaty. The Eighth Circuit below, no stranger to the often complex and delicate issues evolving from Indian treaties, after conscientious re-examination of *United States* v. *White*, 508 F.2d 453 (1974), has determined that Indian hunting rights were not abrogated by the statutes in question. Their decision is narrow. Indians only have the right to take eagles for traditional religous purposes on the reservation where they are members. The First Amendment requires no less. Any taking that is for other than traditional purposes can be prosecuted. Indeed, Dwight Dion, Sr., is subject, except for the argument below, to further prosecution on the charges under consideration by this Court.

IV. CONGRESS DID NOT INTEND THAT DWIGHT DION, SR., SHOULD BE PROSECUTED FOR TAKING AND SELLING THE SAME EAGLES UNDER THE FACTS OF THIS CASE.

The government in this case has charged Dwight Dion, Sr., with taking and selling the same eagles.[13] Thus, for example, he was charged in Count VIII with taking three bald eagles in violation of 16 U.S.C. 1538(a)(1)(B) and 1540(b)(1) and selling under Count IX the same three eagles, plus an additional one, in violation of 16 U.S.C.

[13] This issue was not raised at trial. Counsel on appeal did not represent Dion either at the trial or appellate court.

703 and 707. The same thing happened to the one bald eagle involved in Count X and XI. In Count XII, he was charged with taking a golden eagle in violation of 16 U.S.C. 668 and selling in Count XIII the same golden eagle in violation of 16 U.S.C. 703 and 707.

The BEPA, ESA and Migratory Bird Treaty Act, hereinafter MBTA, all three prohibit the taking and sale of bald eagles. The ESA, however, does not cover the golden eagle because that bird is not endangered. All takings were prosecuted under the ESA, except the golden eagle which was prosecuted under the BEPA. All sales were prosecuted under the MBTA because that provision provides that in the case where an eagle is taken for the purpose of sale or is sold, the maximum penalty is imprisonment for not more than two years. The maximum penalty for a sale under either the BEPA or ESA is imprisonment for not more than one year.

Although Dion has been convicted of selling the same eagles that he was also charged with taking, the convictions on two of the taking counts under 16 U.S.C. 1538 and 1540 have been reversed by the Eighth Circuit and one count under the BEPA was dismissed prior to trial and affirmed. This appeal deals with all three taking counts. It is the position of Dion that he cannot be prosecuted for taking the same identical eagles that he has already been convicted of selling.

The starting point as to whether or not Congress intended for Dion to be convicted of taking and then selling the same eagles, under the facts of this case, must begin with the language of the statute. *Ball* v. *United States*, 105 S.Ct. 1668 (1985); *Albernaz* v. *United States*, 450 U.S. 332, 337 (1981); *Heflin* v. *United States*, 358 U.S. 415, 419 (1959). If there is ambiguity as to whether or not

Congress intended for Dion to be prosecuted for taking and selling the same eagles, the rule of lenity should be applied preventing Dion from being prosecuted for both. *See Bifulco* v. *United States*, 447 U.S. 381 (1980); *Bass* v. *United States*, 404 U.S. 335, 347-48 (1971).

The BEPA, ESA and MBTA all three prohibit the taking and sale of bald eagles. However, there is no clear indication in the statutory language or legislative history that Congress intended to criminalize separately the taking and selling *of the same bird*. The ambiguity of the statutes on this point must be resolved ". . . in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Heflin* v. *United States*, 358 U.S. 415, 419 (1959).

The inquiry here must begin with an examination of MBTA since Dion was convicted of selling five eagles under that statute. On its face, that statute appears to make it a single violation to engage in any of a number of activities with respect to one bird. 16 U.S.C. 707(b) provides:

> (b) Whoever, in violation of this subchapter, shall
>
> (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
>
> (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

The language of the BEPA, 15 U.S.C. 668(a), and ESA, 16 U.S.C. 1540(b)(1), are similar to that of the MBTA in that those statutes do not by their terms criminalize different activities affecting a single bird or animal. The purpose of the statutes was to proscribe the various ways

that harm could be done to, in this case, eagles. But the language does not support a statutory construction that allows for multiple prosecutions for harm done to one eagle.

The legislative history of the BEPA is most telling on this point. In particular, the legislative history of the 1972 BEPA amendments shows that Congress was concerned about harm done to a number of birds by an individual, not multiple activities respecting a single bird. In a conversation between House Committee Chairman Dingell and Frank Murphy, representing the Department of Justice, the Chairman inquired whether, in the cases under investigation in Colorado and Wyoming, separate counts would be used for each eagle. Mr. Murphy indicated that under the principle of lenity followed by the Supreme Court, it would be difficult to charge a separate count for each eagle. Hearings on H.R. 697, 9754 and 10384 before the Subcomm. on Fishery and Wildlife Conservation of the Comm. on Merchant Marines and Fisheries, 2nd Part., 92 Cong., 1st Sess. 122 (1972). Senator McGee of Wyoming, one of the sponsors of S. 2547, in testimony before the Subcommittee on the Environment explaining the bill indicated that "(t)he destruction of each eagle would constitute a separate violation of the law." Hearing on S. 2547 before the Subcomm. on the Environment of the Senate Comm. on Commerce, 92 Cong., 2nd Sess. 18 (1972). There is no mention in the legislative history of fractionating the taking of one or more eagles into multiple other crimes.

There is, then, no indication that Congress has authorized a separate prosecution of Dion for taking the same birds for which he has already been convicted of selling. Under these circumstances, the taking was an integral and necessary part of the later sale. Once the sale was

consummated, the taking merged into the sale. *See Prince* v. *United States*, 352 U.S. 322, 328 (1957). The rule of lenity requires that to allow separate prosecutions for those activities, Congress must unambiguously criminalize those activities with respect to each bird. *See Heflin*, 358 U.S. 419. It plainly has not done so here and the government cannot prosecute Dion separately for taking and selling the same bird.

CONCLUSION

The judgment of the Eighth Circuit affirming the dismissal of Count XII and reversing Dion's convictions on Counts VIII and X should be affirmed. Since Dion has already been convicted of selling the same eagles that he is charged with taking, he should not be subject to further prosecution.

Respectfully submitted,

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REPLY

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

DWIGHT DION, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 85-246

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The central premise of the government's case is simply this: Congress does not abrogate the Yankton Sioux Tribe's treaty-based hunting rights by enacting general prohibitions on the taking of eagles—applicable to Indians and non-Indians alike—designed to prevent extinction of the species. Neither respondent nor the various amici provide an answer to the primary thrust of the government's case.

1. By attempting to recast the issue as whether Congress has specifically acted to abrogate the treaty entered into between the United States and the Yankton Sioux Tribe in 1858, the respondent (see, *e.g.*, Br. 17-18) is engaging in an all-or-nothing debate that pits the rights of the Tribe against the general public interest in the conservation of the nation's treasured eagle population. The reality left unaddressed by respondent (and amici) is that treaty rights to hunt a species will inevitably be destroyed if the species is extinguished. As this Court stated in considering the restrictions imposed by the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, on hunting of migratory birds, protection of the nation's wildlife is an "interest of

very nearly the first magnitude." *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920). Because both the Bald Eagle Protection Act (BEPA), 16 U.S.C. 668 *et seq.*, and the Endangered Species Act of 1973 (ESA), 16 U.S.C. (& Supp. II) 1531 *et seq.*, represent congressional responses to a perceived eagle population crisis, it follows that the Acts' restrictions must, to be effective, be comprehensive. See *United States* v. *White*, 508 F.2d 453, 462 (8th Cir. 1974) (Lay, J., dissenting) (BEPA can achieve its conservation purpose only if it applies to everyone).

2. The result the United States seeks here follows from the concededly broad federal authority over Indians and Indian tribes. The BEPA and ESA are general statutes which, by their terms, do not exclude Indians from their coverage.[1] Indeed, by creating certain exceptions in both the BEPA for the taking, possession and transportation of eagles "for the religious purposes of Indian tribes" (16 U.S.C. 668a), and in the ESA for takings of protected species by any "Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" (16 U.S.C. 1539(e)(1)(A)), Congress indicated its intention that the restrictions of both Acts apply to Indians. To hold otherwise would render these carefully limited exemptions meaningless.[2]

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[1] Cf. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 122 (1949) (federal statute regulating Alaskan fishing rights "applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens, and so applies whether those natives are or are not residents on a reservation").

[2] This is hardly a novel notion. For example, in 1855 the Makah Indians were granted an express treaty right to conduct sealing activities. Treaty of Jan. 31, 1855, art. 4, 12 Stat. 940. However, the United States, in response to an international conservation dispute with Great Britain, subsequently passed legislation prohibiting sealing, but creating a limited exception for traditional Indian sealing. Act of Apr. 6, 1894, ch. 57, 28 Stat. 52 *et seq.* The Attorney General concluded that Makah Indians who did not fall within the specific exception were subject to the federal statute's general prohibitions. 21 Op. Att'y Gen. 466 (1897). The Indian Claims Commission later agreed, stating that the Makah Indian's rights "are not so absolute, exclusive, and unlimited that they cannot be limited or accommodated * * * [by] proper measures to conserve and protect our natural resources for the general welfare and benefit of all citizens." *Makah Indian Tribe* v. *United States*, 7 Indian Cl. Comm'n, 477, 496 (1959), aff'd mem., 151 Ct. Cl. 701 (1960), cert. denied, 365 U.S. 879 (1961). See also *United States* v. *The James G. Swan*, 50 F. 108 (D. Wash. 1892) (holding that a Makah vessel is subject to forfeiture for illegal taking of seals).

As detailed in our opening brief (at 26-31), Congress added the Section 668a religious exception to the BEPA in 1962, authorizing the Secretary of the Interior to issue permits for the taking of eagles if he finds that the taking is "compatible with the preservation" of the eagle and is "for the religious purposes of Indian tribes." The legislative history of that Section corroborates its logically inherent premise—that Congress believed the statute applied to Indians. See *Protection for the Golden Eagle: Hearing on*

Respondent mistakenly suggests (Br. 11) that a federal district court decision, *United States* v. *Cutler*, 37 F. Supp. 724 (D. Idaho 1941), and a 1942 opinion of the Solicitor of the Interior, 1 Op. Solic. Interior Dep't 1090 (1942), support an inference that Congress originally enacted the BEPA with the understanding that it would not apply to Indians. However, both of these sources post-dated the 1940 enactment of the BEPA. As the Makah controversy demonstrates, pre-1940 authority supports an opposite inference. See also *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556 (1916). Indeed, a 1934 Solicitor's opinion concludes that the Migratory Bird Treaty Act, similar in its terms to the BEPA, would apply to Indians who hunted upon their reservations. 54 Interior Dec. 517 (1934). Furthermore, this Court had recently indicated that statutes of general application should generally apply to Indians. *Choteau* v. *Burnet*, 283 U.S. 691, 693-694 (1931). Notably, *Cutler* has been subject to sound criticism. See Coggins & Modrcin, *Native American Indians and Federal Wildlife Law*, 31 Stan. L. Rev. 375, 408 (1979) ("*Cutler* is certainly wrong as a statement of the law.").

S.J. Res. 105 and H.R.J. Res. 489 Before a Subcomm. of the Senate Comm. on Commerce, 87th Cong., 2d Sess. 3, 7 (1962).

Similarly, as detailed in our opening brief (at 28-30), in passing the ESA in 1973, Congress failed to enact an earlier version of the legislation that contained an exemption for "American Indians, Aleuts and Eskimos," which would have preserved Indian treaty rights (H.R. 13081, 92d Cong., 2d Sess. § 5(a)(2) (1972)), or a provision that would have allowed limited takings by Indians (S. 3199, 92d Cong., 2d Sess. (1972)). In light of the comprehensive nature of the ESA, and its narrowly written exceptions for Alaskan Indians, the failure to enact these additional Indian exemptions "virtually requires the conclusion that Congress intended the Act to cover Indian activities." Coggins & Modrcin, *Native American Indians and Federal Wildlife Law*, 31 Stan. L. Rev. 375, 405 (1979).[3]

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[3] Respondent is plainly wrong in suggesting (Br. 26) that a special exception for Alaskan natives was enacted because their aboriginal hunting rights were terminated under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* Nothing in the legislative history supports that argument. As we explain in our opening brief (at 30), the Alaskan native exception was enacted in response to the Alaskan natives' unique dependence on species, such as the bowhead whale, likely to be regulated under the ESA. See 119 Cong. Rec. 25677 (1973); see also 118 Cong. Rec. 8400-8401 (1972) (describing a simliar exception for Alaskan natives under the Marine Mammal Protection Act, 16 U.S.C. 1371(b)).

Amici National Congress of American Indians suggest (Br. 15-16) that the failure to include a specific reference to Indian treaty rights in the currently pending, proposed reauthorization of the ESA supports the claim that the ESA does not limit those rights. In fact, the hearings to which they refer (*Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 311-457 (1985)) are to precisely the opposite effect. They show that the Department of the Interior drafted an amendment at the subcommittee's request to overcome the problems posed by

3. Rather than casting doubt on the applicability of the BEPA and ESA to Indian tribes, this Court's decisions make clear that comprehensive, nondiscriminatory conservation statutes apply to Indians. This is consonant with the continued existence of treaty hunting rights, because such rights never grant a tribe the self-defeating right to hunt any species to extinction.

In *Puyallup Tribe* v. *Dep't of Game (Puyallup I)*, 391 U.S. 392, 398 (1968), this Court found that the State of Washington could regulate the reserved fishing rights of the Puyallup Tribe "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." Because the state regulations that followed failed to accommodate the rights of Indians, but instead allowed non-Indians to preempt those rights, the regulations were struck down in *Dep't of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973). Significantly, however, the Court there clearly reaffirmed that tribal fishing rights "can be controlled by the need to conserve a species; * * * the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Id.* at 49. The present case, of course, does not involve state regulation of a tribe's reserved

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the decision below (*id.* at 314, 427). Representatives of the Department (*id.* at 313-314) and subcommittee members (*id.* at 320, 411-414, 415-418, 430-431) nevertheless clearly expressed the view that that decision was incorrect, and that the ESA as originally enacted applied to Indian treaty rights. It was also repeatedly predicted that this Court would so hold (*id.* at 419, 421, 432). It was suggested that "the only subject that this Congress need deal with, if it need deal with any at all, is that which *Dion* deals with, which is the treaty rights, and on that subject, your choices are to wait for the Supreme Court to act or to reaffirm what * * * is already clear from the act"—that it applies across the board to *all* takings of endangered and threatened species (*id.* at 422). The former alternative was adopted (*id.* at 432), as suggested by Interior (*id.* at 314, 316). See 131 Cong. Rec. H6468 (daily ed. July 29, 1985). Contrary to the implication of amici, Congress has not yet completed action on the reauthorization.

rights. But the *Puyallup* cases and their progeny establish beyond dispute that a state can enact nondiscriminatory, generally applicable conservation measures to preserve a species, although the state is otherwise powerless to affect treaty hunting or fishing rights. Certainly the federal government, whose powers as sovereign are much greater, can consistently with its responsibilities to the various tribes impose limits on treaty rights to prevent extinction of a species.[4]

4. Respondent (Br. 18-19) and the amici challenge the congressional determination that golden eagles are in need of protection. While it is true that the golden eagle is not listed as a threatened or endangered species under Section 4(a) of the ESA, 16 U.S.C. 1533(a), it is nonetheless undisputed that it is a protected bird subject to the prohibitions of the BEPA. Respondent is, in effect, asking this Court to substitute its judgment for that of Congress regarding the need for protection of the golden eagle (both for its own sake and because it is difficult for hunters to distinguish it from the bald eagle). However, it is not the role of the courts to reweigh the evidence that resulted in a congressional determination that a valued public resource was in need of protection. *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976).

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[4] Cf. *Aleut Community* v. *United States*, 117 F. Supp. 427, 431 (Ct. Cl. 1954). Respondent's attempt (Br. 15) to distinguish this Court's decisions in the *Puyallup* cases and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), as involving in-common rights to fish as opposed to the assertedly "exclusive" hunting rights he possesses is unavailing. Where, as here, a migrating species has been afforded protection by Congress, all citizens share an interest in the species, and share in the responsibility to refrain from hunting the species to extinction. In a real sense, therefore, the rights (and responsibilities) of the Tribe and other citizens vis-a-vis bald and golden eagles are no less "in-common" than those involved in the *Puyallup* cases.

Conspicuous by its absence is any attempt by respondent or amici to reconcile their argument that the danger to either the golden or bald eagle by Indian hunting is not a real threat with the express congressional determination that both species are in need of protection. It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g.*, *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983). As we have demonstrated in our opening brief, application of the prohibitions of both the ESA and the BEPA to Indians who take protected species either on or off-reservation is fully consistent with the statutory language and those statutes' respective legislative histories.

5. There is no merit in the contention advanced by amici that application of the BEPA and ESA in this case violates the Free Exercise Clause of the First Amendment. Respondent did not allege at trial that the takings in question were for religious purposes. This case, therefore, presents no occasion for this Court to consider whether any taking of a protected species by an Indian for religious purposes is subject to either the BEPA or ESA.

A. Prior to trial, respondent filed a Motion For Dismissal asserting, inter alia, that the ESA, BEPA and the Migratory Bird Treaty Act were unconstitutional restrictions on his religious practices. The district court held a pretrial hearing on respondent's motion, at which it heard testimony (J.A. 11-21) concerning the religious practices of the Native American Church of North America, of which respondent is a member (*id.* at 22), as well as testimony by respondent himself (*id.* at 21-29). This testimony established that the Native American Church looks with disfavor on the sale of religious prayer instruments (*id.* at 11) and is opposed to the killing of eagles (*id.* at 12). Only a few Indians are capable of making prayer instruments, and these craftsmen make religious objects for anyone in the church who requires

their use (*id.* at 14). Significantly, respondent did not assert that he took the five eagles in question for religious purposes. The district court refused to dismiss the indictment on religious grounds (Pet. App. 70a), nevertheless making clear that respondent would be free at trial to introduce evidence regarding the religious motivation, if any, for his taking of eagles. Respondent did not offer any such evidence at trial. In fact, respondent here admits (Br. 21 n.8) that the takings in this case were not for religious purposes. It could hardly be otherwise, since the evidence clearly shows that the birds taken were sold to federal agents posing as dealers in Indian arts and crafts (Pet. App. 27a-29a).

Having failed to establish a factual predicate for his claim of a violation of his First Amendment rights, respondent may not now raise the constitutional issue. By contrast, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Amish challenging Wisconsin's compulsory school-attendance law "abundantly" supported their claim that the State's requirement of compulsory formal education after the eighth grade "would gravely endanger if not destroy the free exercise of [their] religious beliefs" (406 U.S. at 219). This Court accordingly found, on balance, that the State could not compel such school attendance (406 U.S. at 234). But respondent here failed to present any factual support for a free exercise claim, and in fact concedes that the takings in this case were not for religious purposes. There is, therefore, no occasion at his behest for this Court to consider a constitutional challenge to the BEPA and ESA, grounded on their possible application "to other persons or other situations." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).[5] If, at some future time,

[5] Amici's discussion (see, *e.g.*, National Congress of American Indians Br. 12-16) of the American Indian Religious Freedom Act, 42 U.S.C. 1996 *et seq.*, is of no aid to respondent. That entirely exhortatory statute reflects Congress's desire to protect the "possession of sacred objects" by Indians, which, of course, says nothing about the killing or sale of eagles or eagle parts. In fact, the legislative history indicates that Congress intended simply to protect legally acquired artifacts. H.R. Rep. 95-1308, 95th Cong., 2d Sess. 3 (1978); see also 124 Cong. Rec. 21444 (1978) (statement of Rep. Udall) ("[I]t is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians. It is not the intent or the effect of my bill to permit Indians to cause the extinction of a species."). Accord, Federal Agencies Task Force, U.S. Dep't of Interior, *American Indian Religious Freedom Act Report, P.L. 95-341*, at 72 (Aug. 1979).

enforcement actions under the BEPA or the ESA actually interfere with the rights of native Americans to the free exercise of their religion, it will then be time enough to consider whether those actions impermissibly burden First Amendment rights.[6] The relationship between the government's pursuit of its statutorily-mandated objectives and Indian religious freedom raises issues that are neither trivial nor insignificant. See, *e.g.*, *Northwest Indian Cemetery Protective Ass'n* v. *Peterson*, 764 F.2d 581 (9th Cir. 1985), petition for reh'g pending, No. 83-2225. However, this case does not involve any such issues; for that reason, this Court should decline the invitation of respondent and amici to address them.[7]

[6] Although amicus Hopi Indian Tribe details at some length the Hopi religious practices that involve the use of golden eagle feathers (Br. 7-11), we note that there is no claim that enforcement of either the BEPA or the ESA has to date interfered with those practices. See, *e.g.*, Br. 23-24.

[7] It is inappropriate to apply to this case the principles developed in order to avoid the chilling effect of overbroad legislation on expressive activities protected by the First Amendment. See, *e.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809, 815-818 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 602, 611-615 (1973). Even if we assume that these principles, which "reflect[] the transcendent value to all society of constitutionally protected expression" (421 U.S. at 816) and association (413 U.S. at 612-613), apply to other rights protected by the First Amendment, they surely are inapplicable where, as here, the area affected by the law as a whole does not to any substantial degree involve First Amendment activities, and is clearly constitutional in the great pre-

B. In any event, contrary to assertions by amici, Congress has adequately accommodated the religious needs of Indians by empowering the Secretary under the BEPA to issue permits authorizing the taking of bald and golden eagles "for the religious purposes of Indian tribes" (16 U.S.C. 668a). See 50 C.F.R. 22.2. Since June 1977, the Department of the Interior has provided 673 bald eagle and 3,266 golden eagle carcasses to Indians from its central repository in Pocatello, Idaho.[8] Contrary to the

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ponderance of applications where conduct is involved. "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the [government] to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate [government] interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." 413 U.S. at 615; cf. 421 U.S. at 817. The ordinary rule is "that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional" (*United States* v. *Raines*, 362 U.S. at 21). At most, "[a] plausible challenge to a law as *void for overbreadth* can be made [by one whose conduct is not itself constitutionally protected] only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach." L. Tribe, *American Constitutional Law* 711 (1978) (emphasis in original); cf. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 858-862, 882-910 (1970). Respondent can satisfy neither of these criteria. If there is in fact any constitutional overbreadth in either the BEPA or the ESA, that defect can be cured when a proper claimant comes before the Court.

[8] The assertion of amici Assiniboine and Sioux Tribes of the Ft. Peck Reservation (Br. 23) that "white ranchers * * * are given permits to kill eagles to protect sheep or cattle" is factually erroneous. See also Hopi Indian Tribe Amicus Br. 20 n.5. No depredation permits (50 C.F.R. 22.23) or depredation orders (50 C.F.R. 22.31) that allow the killing of eagles have been issued since 1983.

assertions of respondent and amici, the United States is acting to protect and preserve the rights of American Indians to use eagles and their parts for religious purposes.[9]

6. Finally, respondent asserts (Br. 31-34) that "he cannot be prosecuted for taking the same identical eagles that he has already been convicted of selling." Respondent did not raise this argument in the lower courts and, consequently, those courts had no occasion to pass on it. Accordingly, this Court should decline to consider the issue. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 16-17. There is, in any event, no merit to this claim—which, of course, raises solely an issue of statutory construction (see, *e.g.*, *Missouri* v. *Hunter*, 459 U.S. 359 (1983)). Congress specifically provided in the BEPA that "each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section" (16 U.S.C. 668(a)). See also 16 U.S.C. 1540(a), providing—for civil penalties under the ESA—that "[e]ach violation shall be a separate offense." The criminal penalties provision (16 U.S.C. 1540(b)), essentially overlaps the civil provision, and evidently has the same scope.

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[9] Moreover, it has been and remains the policy of the Department of the Interior to permit Indians to "possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers" "without fear of Federal prosecution, harassment, or other interference." This policy was announced by Secretary of the Interior Rogers C.B. Morton on February 5, 1975, and has been adhered to since that time. The news release describing this policy was made part of the district court record in this case as an attachment to the government's response to the motion for dismissal, filed on July 26, 1983.

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals affirming the dismissal of Count 12 of the indictment and reversing respondent's convictions on Counts 8 and 10 should be reversed

Respectfully submitted.

CHARLES FRIED
Solicitor General

MARCH 1986

AMICUS CURIAE

BRIEF

(2)

No. 85-246

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner

v.

DWIGHT DION, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE

ENVIRONMENTAL DEFENSE FUND, INC., NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, DEFENDERS OF WILDLIFE, CENTER FOR ENVIRONMENTAL EDUCATION, IZAAK WALTON LEAGUE OF AMERICA, COLORADO WILDLIFE FEDERATION, MINNESOTA CONSERVATION FEDERATION, NEW MEXICO, WILDLIFE FEDERATION, SOUTH DAKOTA WILDLIFE FEDERATION, and WYOMING WILDLIFE FEDERATION

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QUESTION PRESENTED

Do implied Indian tribal hunting rights provide a defense to the taking prohibitions of the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, and the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, for the taking of an endangered migratory bird for non-religious, non-subsistence purposes?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-246

UNITED STATES OF AMERICA,
Petitioner

v.

DWIGHT DION, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE

ENVIRONMENTAL DEFENSE FUND, INC., NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, DEFENDERS OF WILDLIFE, CENTER FOR ENVIRONMENTAL EDUCATION, IZAAK WALTON LEAGUE OF AMERICA, COLORADO WILDLIFE FEDERATION, MINNESOTA CONSERVATION FEDERATION, NEW MEXICO, WILDLIFE FEDERATION, SOUTH DAKOTA WILDLIFE FEDERATION, and WYOMING WILDLIFE FEDERATION

IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2, the Environmental Defense Fund, Inc. and the other above-listed organizations file this brief as amici curiae in support of petitioner United States. Letters of consent from counsel for the parties have been filed with the clerk.

Amici curiae are twelve national and statewide non-profit membership organizations dedicated to the conservation of natural resources and in particular the preservation of endangered species. Members of amici curiae regularly use and enjoy the wildlife of the United States for outdoor recreation, including nature observation, photography, scientific study, and aesthetic enjoyment. Members of amici curiae also have a substantial interest in the protection and preservation of the bald eagle and other endangered species.

A more detailed statement of the interests of amici curiae is set forth in Appendix A.

SUMMARY OF ARGUMENT

The Respondent, a member of the Yankton Tribe of Sioux Indians, claims immunity from prosecution under the Bald Eagle Protection Act and the Endangered Species Act for the killing of bald eagles on his reservation because of hunting rights impliedly reserved in an 1858 treaty. However, a careful examination of the historical circumstances of that treaty raises considerable doubt whether it implies any right at all to kill, for non-religious purposes, a species of no subsistence value.

Even assuming that a treaty right to kill bald eagles was impliedly reserved in the 1858 treaty, that right is necessarily subject to nondiscriminatory federal regulation for the purpose of assuring the preservation of the species. Both the Bald Eagle Protection Act and the Endangered Species Act were enacted for the exclusive purpose of preventing the extinction of wildlife and both are even-handed and nondiscriminatory in their application. Thus, neither statute abrogates any treaty right, for the right itself is subject to conservation restrictions of this character.

To the extent that either the Bald Eagle Protection Act or the Endangered Species Act may be deemed to abrogate Indian treaty rights, the surrounding circumstances and legislative history of each reveals that Congress intended to do so. The clear purpose of each statute to take all measures necessary to prevent the extinction of species, coupled with carefully limited

Indian exceptions, clearly shows that Congress did not intend to allow a broader, open-ended exemption for all Indian treaty hunting.

ARGUMENT

I. INTRODUCTION

The case now before this Court arose out of the prosecution of Respondent Dwight Dion, Sr. for violations of the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq,* and the Endangered Species Act, 16 U.S.C. 1531 *et seq.* In the decision under review, the United States Court of Appeals for the Eighth Circuit held that American Indians with reserved treaty hunting rights, even when such rights are only implied in a treaty otherwise silent on its face with respect to hunting, may kill bald eagles (and apparently any other endangered species)[1] without limitation or restriction by either law. *United States v. Dion,* 752 F.2d 1261 (8th Cir. 1985). Provided only that such killing is not done for a commercial purpose,[2] Respondent Dion and other members of the Yankton Sioux Tribe may lawfully

[1] Though this case concerns bald eagles, its outcome may affect many other endangered species as well. Recently, a Florida court dismissed, on the basis of the decision here under review, a complaint against an Indian charged with killing a Florida panther, an endangered species of which perhaps fewer than thirty individuals still survive in the wild. *See State v. Billie,* No. 83-202 (Fla. Cir. Ct. June 28, 1985). In addition, in 1972 the Department of the Interior identified 119 rare species believed to occur on or near Indian reservations. *See* Hearings before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on Predatory Mammals and Endangered Species, 92d Cong., 2d Sess. 143-44 (1972). Of these, 32 are protected today by the Endangered Species Act. *See* 50 C.F.R. 17.11(h) (1984).

[2] The Respondent has not appealed from the Eighth Circuit's holding that the killing of bald eagles for commercial purposes is outside the scope of his treaty rights. Although the Eighth Circuit found that such killing was outside the scope of the treaty rights of the Yankton Sioux, other courts have found that other Indian treaties encompass the taking of wildlife for commercial purposes. *See, e.g. United States v. Washington,* 384 F.Supp. 312, 351 and 402 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), and *United States v. Michigan,* 471 F.Supp. 192, 260 (W.D. Mich. 1979), *remanded,* 623 F.2d 448 (6th Cir. 1980).

kill bald eagles on their reservation because, in the Eighth Circuit's view, Congress did not expressly reveal an intention to abrogate their treaty hunting rights in passing either statute.

As amici will show, the Eighth Circuit's decision starts from a dubious premise and proceeds to an erroneous conclusion. Contrary to its conclusion, the prohibitions of both the Bald Eagle Protection Act and the Endangered Species Act apply to Respondent Dion. So applying them, however, does not abrogate or destroy the rights of the Yankton Sioux Tribe, for the Tribe's interests can be harmonized with the requirements of these two laws. Indeed, a broad and comprehensive application of these laws is necessary to achieve the purposes not only of the laws themselves, but even of the Yankton Sioux Tribe and other treaty Indians.

The premise of the Eighth Circuit's decision is that any restriction on the right of Yankton Sioux Indians to kill bald eagles on their reservation, other than for commercial purposes, constitutes an "abrogation" of rights impliedly reserved by them in the 1858 Treaty with the Yankton Tribe of Sioux, Apr. 19, 1858, 11 Stat. 743 *et seq.* The Tribe's right, in the view of the Eighth Circuit, simply cannot coexist with any federal regulation of its exercise. Casting this controversy in such absolute terms is unnecessary, however, for "limited federal regulation can coexist with Indian treaty rights in the same way that zoning ordinances can coexist with private property rights." Coggins, Native American Indians and Federal Wildlife Law, 31 Stanford L. Rev. 375, 378 (1979). To determine whether a particular regulation impermissibly infringes a tribal right requires an examination of both the character of the claimed right and the nature of the regulation. Here, as will be shown below, the claimed right is neither essential to the survival of the Tribe nor directly related to the purposes of the treaty, and the regulation is nondiscriminatory and clearly necessary for the conservation of the species.

II. THE ENDANGERED SPECIES ACT AND THE BALD EAGLE PROTECTION ACT ARE NONDISCRIMINATORY, REASONABLE CONSERVATION MEASURES NECESSARY TO PREVENT THE EXTINCTION OF LIVING RESOURCES AND DO NOT ABROGATE ANY RIGHTS OF THE RESPONDENT

A. Congress Enacted the Bald Eagle Protection Act and the Endangered Species Act for the Sole Purpose of Preventing the Extinction of Species

In 1940, believing that the American bald eagle, adopted as the symbol of our Nation by the Continental Congress of 1782, was faced with the threat of extinction, Congress enacted the Bald Eagle Protection Act, *supra.* Despite uncertainty over the constitutional basis for federal legislation prohibiting the killing of eagles,[3] Congress concluded that preventing the loss of the bird was a matter of fundamental importance, because it was "no longer a mere bird of biological interest but a symbol of the American ideals of freedom." *See* 16 U.S.C.A. 668 note.

Over the next three decades, recognition of the magnitude and significance of the problem of endangerment and extinction of wildlife grew markedly. In response, Congress enacted the Endangered Species Act of 1973, *supra,* which this Court has called "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill,* 437 U.S. 153 (1978). While still recognizing the importance of preserving species like the bald eagle for their symbolic

[3] Two decades earlier, in the landmark case of *Missouri v. Holland,* 252 U.S. 416 (1920), this Court had upheld, under the Constitution's treaty authority, the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* However, in 1940 the bald eagle was not among the birds protected by the Treaty Act, because it was not included in the 1916 Convention between the United States and Great Britain (on behalf of Canada) for the Protection of Migratory Birds, 39 Stat. 1702, T.S. No. 628, which the Treaty Act implemented. Only as a result of the 1972 addition of bald eagles to the list of birds protected by a similar treaty with Mexico did bald eagle protection become an international obligation. *See* Agreement Supplementing the Convention of Feb. 7, 1936, for the Protection of Migratory Birds and Game Mammals, March 10, 1972, 23 U.S.T. 260, T.I.A.S. No. 7302.

value, Congress by 1973 had come to realize that a myriad of other values, including many of a highly utilitarian nature, were threatened by the accelerating endangerment and loss of species.

The legislative history of the Act is filled with examples of major advances in medicine, agriculture and industry made possible by the discovery of unique chemical or other characteristics of previously obscure and unvalued wild plants and animals.[4] To prevent the unwitting loss of future such discoveries, and to protect the "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people", 16 U.S.C. 1531(a)(3), of endangered species, Congress concluded that the stringent requirements of the Endangered Species Act were necessary. Pursuant to the standards of that Act, the Secretary of the Interior has listed the bald eagle as an "endangered" species throughout the lower 48 States, except in Washington, Oregon, Michigan, Wisconsin, and Minnesota, where it is listed as "threatened." [5]

[4] See, for example, the following passage from the House Report:

From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we knew its potentialities—we would never have tried to synthesize it in the first place.

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

H.R. Rep. 412, 93d Cong., 1st Sess. 5 (1973).

[5] *See* 50 C.F.R. 17.11(h) (1984). An "endangered" species is one determined to be "in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. 1532(6) and a "threatened" species is one determined to be "likely to become an endangered species within the foreseeable future." *Id.* 1532(20). The authority to designate the bald eagle as endangered in certain areas and threatened in others derives from the Act's definition of "species," which includes subspecies and distinct population segments. *Id.* 1532(16).

In broadly sweeping terms, the Endangered Species Act prohibits the "taking", [6] importing, and exporting of, and interstate commerce in, wildlife determined to be in danger of extinction. 16 U.S.C. 1538(a)(1). It also prohibits the possession of unlawfully taken endangered wildlife, *id.*, requires all federal agencies to use their authorities to further the Act's purposes, and forbids them from authorizing, funding or carrying out any action that jeopardizes the continued existence of any threatened or endangered species. 16 U.S.C. 1535. Moreover, whereas earlier federal (and most state) conservation laws had typically been limited to fish, birds, mammals, and a few other vertebrate animals, the Endangered Species Act extends its protections to all life, both vertebrate and invertebrate animals, and even plants. *See* 16 U.S.C. 1532(8), (14), and (16). In Chief Justice Burger's words, the Act reflects, "in literally every section", a plain intent "to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill, supra* at 184.

B. The Only Treaty Right Arguably at Stake Here Is a Dubious Right to Take for Non-Religious Purposes a Species of No Subsistence Value

The Eighth Circuit concluded that the 1858 Treaty with the Yankton Sioux *supra*, reserved in the Tribe a right to hunt on the reservation it established, even though the treaty itself says nothing on the subject.[7] In *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), this Court held that Indian rights to hunt and fish need not be expressly reserved in a treaty, but may be implied. In that case, however, the Court

[6] The term "take" is broadly defined in the Act to mean "to harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect or attempt to engage in any such conduct." 16 U.S.C. 1532 (19). Even environmental modifications that result in incidental and unintended harm to endangered species are subsumed within this broad prohibition. *See Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F.Supp. 985 (D. Ha. 1971), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

[7] Though the Eighth Circuit held that the treaty hunting rights of the Yankton Sioux were implied in the facially silent 1858 treaty, the court also asserted in a footnote that the earlier First Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 *reprinted in* C. Kappler, *Indian Affairs, Laws and Treaties*

(footnote continued)

emphasized language in the treaty providing that the reservation was "to be held as Indian lands are held" and reasoned that such words "sum up in a single phrase the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life." *Id.* at 406, n. 2.

No comparable language appears in the Treaty with the Yankton Sioux. Moreover, the record in *Menominee* revealed "that the lands covered by the [treaty] were selected precisely because they had an abundance of game." *Id.* at 406. Here, however, the Treaty with the Yankton Sioux was negotiated for the primary purpose of putting an end to the competing claims of various bands of Sioux Indians over ownership of an area of land in eastern South Dakota, *see The Yankton Sioux v. United States,* 97 Ct. Cl. 56 (1942), much as the 1851 First Treaty of Fort Laramie, Sept. 17, 1851, *reprinted in* C. Kappler, *Indian Affairs, Laws and Treaties* 1065 (1904), had had as one of its primary purposes the settling of territorial disputes among the Sioux and various other major tribal groups of the Northern plains.[8]

(footnote continues)

1065 (1904), to which the tribe was a party, had expressly reserved such rights in the various tribes of the Sioux Nation. 752 F.2d at 1264 n. 8. However, in the first article of their 1858 treaty, the Yankton Sioux agreed to "relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the Treaty of Laramie." Thus, the rights at issue here derive solely from the 1858 treaty and not its predecessors. Beyond that, however, Article 5 of the 1851 First Treaty of Fort Laramie merely preserved the privilege of each tribe to hunt in the territories of the other tribes recognized in such treaty. *See Montana v. United States,* 450 U.S. 544, 559 (1981). Thus, even if the Yankton Sioux had not relinquished all claims growing out of earlier treaties, the face of the 1851 treaty reveals little about "the precise nature and extent" of such hunting privilege *vis a vis* the federal government.

[8] As this Court noted in *Montana v. United States,* 450 U.S. 544 (1981), "warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie," *id.* at 548, which "did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories." *Id.* at 554.

These differences suggest strongly that "the precise nature and extent of these hunting and fishing rights," matters left undecided in *Menominee,* 391 U.S. at 407, are not so encompassing as to oust altogether carefully limited federal regulation of the taking of endangered wildlife. That same conclusion is reinforced by a consideration of the historical context of the Treaty with the Yankton Sioux, which shows that the Sioux Tribes' overriding interest in hunting was for the subsistence utilization of buffalo.

The Sioux, like the other Indians of the Northern plains, adapted their nomadic existence to the wanderings of the great buffalo herds. Buffalo provided an abundant source of food and warm clothing against the harsh winter cold and were vital to the subsistence of the Sioux in a way that no other species was.[9] Indeed, in the historical records pertaining to the 1851 First Treaty of Fort Laramie, a predecessor treaty to which the Yankton Sioux were a party, the buffalo is the only species mentioned by name. *See* Letter from D. D. Mitchell, Superintendent of Indian Affairs, to L. Lea, Commissioner of Indian Affairs (Nov. 11, 1851), in C. Kappler, *Indian Affairs, Laws and Treaties* 1076 (1904).[10] Likewise, in the 1868 Second Treaty of Fort Laramie, Apr. 29, 1868, 15 Stat. 635, which carved out the "Great Sioux Reservation" from the much larger "Sioux Territory" that had been created by the 1851 First Treaty of Fort Laramie, the Sioux retained the right to hunt outside their reservation, but only "so long as the buffalo may range thereon in such numbers as to justify the chase." 15 Stat. at 639. Though the Yankton Tribe was not a party to the 1868 treaty, it nevertheless reveals that to the Sioux generally, "hunting" was virtually synonymous with hunting buffalo.

[9] The painter and explorer, George Catlin, writing of his stay among the Sioux, noted that they "live almost exclusively on its [buffalo] flesh, and clothe themselves with its skin." G. Catlin, *Letters and Notes on the North American Indians* (Mooney, ed.) 252 (1975).

[10] A Woolworth, *Ethnohistorical Report on the Yankton Sioux* 183-84 (1974), provides a compendium of published references to the subsistence activity of the Yankton and Santee Sioux Indians from 1700 through 1856, including a report from Lewis and Clark's 1804 expedition. Apart from two references to deer, the buffalo is the only animal specifically mentioned.

Though buffalo were vital to the survival of the Sioux, other species were also taken, including the bald eagle, which was used for ornamentation and in religious rituals. The Eighth Circuit opinion cites record evidence "that historically, Sioux Indians captured eagles in a religious ceremony for religious purposes." 752 F.2d at 1264 n. 9. However, a subsequent ruling of a three-judge panel of that Circuit in this case rejected Respondent Dion's contention that the eagle takings for which the government has prosecuted him here were for religious purposes, *United States v. Dion*, 762 F.2d 674, 679-80 (8th Cir. 1985), and Mr. Dion has not appealed from that ruling. Thus, assuming such a right could be implied at all in the 1858 treaty, the claimed treaty right at stake here is the right to take for non-religious purposes a species of no subsistence value.[11]

C. Even Express Treaty Rights to Take Species Used for Subsistence are Subject to the Federal Government's Inherent Power to Impose Nondiscriminatory Restrictions Necessary for the Preservation of Species

Having thus identified the nature of the right at stake, it is necessary to turn to a consideration of the extent to which that right is subject to federal regulation in the interests of conservation. In a number of cases, this Court has had occasion to consider the extent to which a State—as opposed to the federal government—may, in the interests of conserving a common wildlife resource, impose restrictions on the taking of that resource on Indians with reserved hunting rights. Here, and in the earlier cases, the treaties at issue were negotiated at a time

[11] Referring to its implied reservation of water rights cases, in which the quantity of water reserved for an Indian reservation is determined by the quantity of "practicably irrigable acreage" on the reservation, this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684 (1979), emphasized that "the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secure so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." Applying such a standard here casts very serious doubt on whether there is any treaty right at all to take a species like the bald eagle that has no subsistence value and is thus unrelated to providing a livelihood for Indians.

of relative abundance of game and the thought that any of the then plentiful species might someday be in peril of absolute extinction was probably never contemplated by either side.[12] Nevertheless, as early as 1916, in the case of *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, this Court recognized that treaty rights had to be accommodated to changed conditions that necessitated the "exercise of inherent power under modern conditions for the preservation of wild life." *Id.* at 563.

Recognition of the necessity of exercising that same "inherent power" underlay this Court's reasoning in *Washington Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973), that Indian fishing rights do not

> persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

[12] The 1868 Second Treaty of Fort Laramie, as previously discussed, evidenced a prescient awareness of the possibility that buffalo might eventually be so reduced in number as to justify their chase no longer. Still, at that time, and for several years thereafter, herds numbering in the millions still existed. *See* Anderson, "A Buffalo Story" in Theodore Roosevelt and George Bird Grinnell (eds.) American Big-Game Hunting (1893), quoted in J. Trefethen, *Crusade for Wildlife* 85-86 (1961). By 1903, however, the unremitting slaughter of buffalo had reduced the entire United States population in the wild to only twenty-one animals, all within Yellowstone National Park. Trefethen at 92. Though whites were overwhelmingly responsible for this decimation, Indians were not entirely blameless. Indeed, as early as 1832 the great painter George Catlin wrote of a group of Sioux trading some 1,400 buffalo tongue for a few gallons of whiskey. *See* Catlin, *supra* at 253-54. More generally, even an historian sympathetic to Indian interests has acknowledged that "[t]here can be no denying that the native hunter was the principal agent of wildlife destruction in most theaters of the fur trade." C. Martin, "The War Between Indians and Animals" in 87 *Natural History* 92 (1978).

Indeed, in *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 167 (1977) (*Puyallup III*), where, unlike here fishing was essential to the welfare of the tribe, this Court recognized that the conservation authority of a State extended even to the on-reservation fishing activities of tribal members under a treaty with expressly reserved fishing rights.

The Eighth Circuit sought to avoid the clear import of this Court's various *Puyallup* rulings by asserting that the principles they announced were not ones of general applicability regarding the conservation authority of the States, but rather were only limited principles uniquely applicable to treaties reserving rights to be exercised "in common" with non-Indians. 752 F.2d at 1269. Under its cramped reading of the *Puyallup* cases, a State's conservation power is thus not an "inherent power" at all, but rather a special power derived solely from the language of the particular treaties of the Pacific Northwest. Carrying the Eighth Circuit's reasoning to its logical conclusion, while the Puyallup Indians may not have a federal right to pursue the steelhead until it follows the fate of the passenger pigeon, the Yankton Sioux may do so to the bald eagle. Such a result would be senseless.

This Court has not previously interpreted its *Puyallup* rulings in the narrow way suggested by the Eighth Circuit. For example, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 n. 15 (1983), this Court cited "the State's interest in conserving a scarce, common resource", as well as the "in common" language of the treaty, as among the factors underlaying the result in *Puyallup III*. The federal government's interest in assuring the preservation of an endangered resource can surely be no less than that of the States, particularly since "Congress possesse[s] a paramount power over the property of the Indians," *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), and since here Congress has given the federal government the conservation responsibility otherwise exercised by the States.

The federal conservation interests are particularly substantial here because of the demonstrable off-reservation effects of unregulated Indian hunting of eagles. *Cf. New Mexico v. Mescalero Apache Tribe, supra* at 342. The bald eagle is a

migratory bird. Several hundred spend the winter in South Dakota, but none breed there in the summer.[13] Justice Holmes' observation of more than half a century ago is equally applicable here: the Indians, like the State in *Missouri v. Holland*, ultimately base their rights on the "presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." 252 U.S. at 434. No single jurisdiction, whether it be State or tribal, has the power to assure the conservation of the species, yet each can, because of the bird's migratory character, assure its destruction. Without the concerted action of the federal government, the interest of the Nation as a whole, and the Sioux Indians in particular, in the preservation of the bald eagle cannot be assured.

Moreover, unlike the State in *New Mexico v. Mescalero Apache Tribe, supra*, the federal government does "contribute in [a] significant respect to the maintenance of these resources", which contribution "justif[ies] the assertion of its authority." 462 U.S. at 342. In addition to the numerous National Wildlife Refuges utilized by eagles, the federal government has carried out a variety of other conservation actions, including captive breeding, restocking of wild populations, and regulation of hazardous chemicals in the environment. *See* Hearings before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on Violations of the Bald Eagle Act Oversight, 98th Cong., 1st Sess. 67-70 (1983). Indeed, it was the federal government's banning of the pesticide DDT

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[13] *See* U.S. Fish and Wildlife Service, Northern States Bald Eagle Recovery Plan at 23 and 25 (1983). Major winter concentration areas are in and around various National Wildlife Refuges established and administered by the U.S. Fish and Wildlife Service. Several of these refuges directly border Indian reservations or are immediately across rivers used by the eagles for feeding. *See* Statement of Marion Blank Horn, Acting Solicitor, U.S. Dept. of the Interior, before the Subcomm. on Fisheries and Wildlife Conservation and the Environment, House Comm. on Merchant Marine and Fisheries Concerning Native Taking of Endangered and Threatened Species (June 11, 1985). Thus, unrestricted Indian hunting of eagles not only threatens the eagles but also negates the conservation purposes that the Refuges are to serve. *Cf. North Dakota v. United States*, 460 U.S. 300 (1983).

that has given the bald eagle a chance at recovery. *Id.* at 67-68. Thus, precisely because the Indians' own interest in the preservation of the bald eagle requires concerted federal action, the even-handed, across-the-board prohibitions of eagle hunting stemming from the Bald Eagle Protection and Endangered Species Acts could properly be viewed, not as a limitation of treaty rights, but rather as part of an effort to secure those rights against the irreparable loss that would result from the extinction of this species.[14] Thus viewed, the two statutes can be said to constitute a reasonable "exercise of guardianship over [Indian] interests." *Lone Wolf v. Hitchcock, supra,* at 565.

III. EVEN IF THE ENDANGERED SPECIES ACT AND THE BALD EAGLE PROTECTION ACT ARE DEEMED TO ABROGATE INDIAN TREATY RIGHTS, THERE IS ADEQUATE EVIDENCE OF CONGRESS' INTENTION TO DO SO

If, despite all the foregoing, the provisions of the Bald Eagle Protection Act or the Endangered Species Act are considered to be fundamentally inconsistent with the rights impliedly reserved by the treaty with the Yankton Sioux, this

[14] The prohibitions of the Endangered Species Act are intended to be only temporary, for the Act's very purpose is to enable species to recover "to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. 1531(b) and 1532(3). In the Act's short history, such recovery has already been accomplished for several species. *See e.g.,* Eastern brown pelican, 50 Fed. Reg. 4938 (Feb. 4, 1985), and American alligator, 48 Fed. Reg. 46332 (Oct. 12, 1983), and 46 Fed. Reg. 40664 (Aug. 10, 1981). *See also* Arctic peregrine falcon, 49 Fed. Reg. 10520 (March 20, 1984) and Utah prairie dog, 49 Fed. Reg. 22330 (May 29, 1984). Though the prohibitions of the Bald Eagle Protection Act are permanent, a special statutory exception authorizes the Secretary of the Interior to issue permits for the taking and possession of eagles for Indian religious purposes. 16 U.S.C. 668a. Currently, eagle parts are supplied to Indians for such purposes by the Fish and Wildlife Service from dead eagles that it acquires through law enforcement or other activities. *See* Statement of Marian Blank Horn, *supra.* If and when the bald eagle [illegible] longer requires the protection of the Endangered Species Act, the Secretary of the Interior would, under the Bald Eagle Protection Act, legally issue permits authorizing Indians to take eagles from the wild for their religious purposes.

Court must decide whether Congress intended those prohibitions to take precedence over such Indian rights. In considering that same question, the Eighth Circuit employed a narrow test. It insisted upon an "express reference" in the statutes or their legislative history that Congress intended to abrogate treaty rights, 752 F.2d at 1267, but found none.

As demonstrated earlier, the right at stake here is the right to hunt, for non-religious purposes, a species of no subsistence value. Yet, when considering the far more fundamental question whether an act of Congress had disestablished a reservation area in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), this Court applied a broader test than the "express reference" test insisted upon by the Eighth Circuit here. There this Court held that disestablishment of a reservation area did not require an express reference from Congress, but could be discerned "from the surrounding circumstances and legislative history" of a congressional enactment. *Id.* at 587 (quoting *Mattz v. Arnett,* 412 U.S. 481, 505 (1973)). *A fortiori,* the less momentous issue here can be resolved by a similar inquiry.

This is not the first time this Court has examined the surrounding circumstances and legislative history of these two conservation statutes. With respect to the Endangered Species Act, this Court has already determined that an "examination of the language, history, and structure of the legislation . . . indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill,* 437 U.S. at 174. Indeed, "the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" *Id.* at 187. Moreover, of direct relevance to this case, "Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.'" *Id.* at 179 (quoting S. Rep. 307, 93d Cong., 1st Sess. 2 (1973)). Against such threats, Congress sought to give "absolute protection" to endangered species. 119 Cong. Rec. 25669 (July 24, 1973) (remarks of Senator Tunney).

Notwithstanding its recognition of the threat represented by hunting and its desire to afford endangered species the "highest of priorities," Congress carved out a limited exception

for certain Indians from the Act's general prohibition against hunting. Specifically, Indians, Aleuts, and Eskimos living in Alaska and other permanent residents of Alaskan native villages would be allowed to hunt endangered and threatened species, provided that such hunting was "primarily for subsistence purposes." 16 U.S.C. 1539(e)(1). Moreover, even this hunting could be strictly regulated by the Secretary of the Interior (or Commerce, in the case of marine species), if he found that such subsistence hunting "materially and negatively affects" any such species. *Id.* 1539(e)(4).

The Act's limited exemption for Alaskan natives was derived from a provision of a bill submitted by the Administration, but not acted upon, the previous year. Section 5(a)(2) of that bill would have exempted all treaty Indians and certain others from its prohibitions. *See* H.R. 13,081 and H.R. 13,111, 92d Cong., 2d Sess. (1972), *reprinted in* Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on Predatory Mammals and Endangered Species, 92d Cong., 2d Sess. at 24 (1972). In hearings before the House Subcommittee, the Subcommittee Chairman, Mr. Dingell, and others voiced strong reservations about the broad Indian exemption proposed by the Administration. *See* Hearings on Predatory Mammals and Endangered Species, *supra* at 144-45. In a subsequently submitted written response, the Interior Department offered its opinion that if Congress wanted to "extinguish" Indian treaty hunting rights, that result would not likely be accomplished "if Congress simply deletes Section 5(a)(2)." *Id.* at 144. Ultimately, the following year, the law that Congress passed did not simply delete the former Section 5(a)(2). Rather, Congress retained it, but narrowly limited it so as to apply only in Alaska and added to it the qualifier that the Secretary could regulate even Alaskan native taking when necessary to prevent material and negative effects on protected specie .

Thus, Congress was presented with an Administration bill that would have exempted all Indian treaty hunting, but it chose instead a much narrower Indian exemption. Had it wanted to exempt all Indian treaty hunting, it clearly had

language available to it to do so. From this fact and the broad purposes that Congress articulated, the conclusion seems inescapable that except for the narrow and carefully drawn exceptions specifically set forth in the Endangered Species Act, Congress intended that its prohibitions, necessary to avoid the loss of living resources of incalculable value, be universally applied. Any other result would undermine the very objective that the Act was to serve.

The same conclusion follows from a consideration of the "surrounding circumstances and legislative history" of the Bald Eagle Protection Act. Indeed, the Ninth Circuit, in *United States v. Fryberg*, 622 F.2d 1010 (9th Cir.), *cert. denied*, 449 U.S. 1004 (1980), earlier reached this same conclusion. Congress' purpose in enacting the Bald Eagle Protection Act cannot admit of doubt. The enacting clause of the statute declares the bald eagle to be "the symbolic representation of a new nation under a new government in a new world" and to be "now threatened with extinction." 16 U.S.C.A. 668 note. To prevent that threatened extinction, Congress set forth in the Act "a full catalog of prohibited acts" that were "sweepingly framed." *Andrus v. Allard*, 444 U.S. 51, 56 and 57 (1979). In contrast to the "exhaustive and careful enumeration of forbidden acts" the statute set forth only a few exemptions that were "specifically limited." *Id.* None of these addressed Indians until 1962.

In 1962 Congress amended the Bald Eagle Protection Act to extend its protection to a related species, the golden eagle. Since immature bald eagles, which lack the distinctive white heads and tails of the adult birds, are very hard to distinguish from golden eagles, Congress intended its prohibition of the killing of golden eagles to serve the goal of reducing the accidental killing of bald eagles. *See* S. Rep. 1986, 87th Cong., 2d Sess. 1 (1962). However, in light of the fact that golden eagle feathers were commonly used in Indian religious ceremonies, the Interior Department recommended that the Act be amended to permit such use. *See* Letter from Frank P. Briggs to Warren G. Magnuson (Feb. 5, 1962), *reprinted in* S. Rep. 1986, 87th Cong., 2d Sess. 5, 6 (1962) and 108 Cong. Rec. 22272 (1962). In response, Congress authorized the Secretary

of the Interior to permit the taking, possession, and transportation of bald or golden eagles "for the religious purposes of Indian tribes" if he determines that such activities are "compatible with the preservation of" such birds. 16 U.S.C. 668a.

Against the obvious inference that Congress believed that without such a provision the prohibitions of the Act would apply fully to Indians, the Eighth Circuit offers the novel interpretation that the provision "could have been deemed necessary to permit non-Indians to hunt eagles. . . in order for the Indian tribes to obtain enough eagle parts for their religious needs." 752 F.2d at 1270. Nothing anywhere in the legislative history suggests such an improbable motive. Moreover, the Interior Department, which requested the provision in the first place, has never construed it in the manner suggested by the Eighth Circuit. Its first implementing regulations, promulgated only three months after the amendment became effective, authorized permits only "to those individual Indians who are authentic, bona fide practitioners of such religions." *See* 28 Fed. Reg. 975 (Feb. 1, 1963) (codified at 50 C.F.R. 11.5 (1963)). Current regulations require an applicant for such a permit to submit a certification from the Bureau of Indian Affairs that he is in fact an Indian. *See* 50 C.F.R. 22.21(c) (1984). Until the Eighth Circuit's tortured exercise to create ambiguity where none had existed before, the provision in question had always been understood to extend exclusively to Indians.

Pursuant to the 1962 amendment, the Interior Department regularly makes available to practitioners of Indian religions feathers and other parts from eagles acquired by it through law enforcement or other means.[15] In addition, general regulations pertaining to the disposal of forfeited or abandoned products from endangered species and other wildlife allow the donation of such products "to individual American Indians for the

[15] Since 1977, the Fish and Wildlife Service has filled an average of nearly 600 orders annually from Indians for bald eagle parts from the Service's special Pocatello, Idaho, Supply Depot. *See* Statement of Marian Blank Horn, *supra.* at 5.

practice of traditional American Indian religions." 50 C.F.R. 12.36(c) (1984). Thus, the regulatory schemes under both the Endangered Species Act and the Bald Eagle Protection Act represent carefully crafted accommodations of Indian and conservation interests. To the extent that such sensitive accommodations be deemed an abrogation of Indian treaty rights, there is ample evidence from the "surrounding circumstances and legislative history" of these two important laws that such was the intent of Congress.

CONCLUSION

For the reasons set forth herein, amici curiae respectfully urge this Court to reverse the decision of the Eighth Circuit and to find that the prohibitions of both the Endangered Species Act and the Bald Eagle Protection Act apply to the Respondent.

Respectfully submitted,

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November 1985

APPENDIX A

The Environmental Defense Fund, Inc. ("EDF") is a nationwide public interest organization dedicated to protecting and improving environmental quality. Incorporated in 1967 in the State of New York, EDF grew out of a local citizen-initiated effort to protect the wildlife of Long Island from the hazardous pesticide, DDT. EDF maintains its headquarters at 444 Park Avenue South, New York, New York 10016 (telephone 212-686-4191).

The Center for Environmental Education ("CEE")is a nonprofit conservation organization dedicated to the protection of endangered and threatened species and their habitats. Incorporated in 1972 in the District of Columbia, CEE has over half a million supporters.

Defenders of Wildlife is a District of Columbia nonprofit corporation dedicated to the restoration, protection, and enhancement of wildlife and wildlife habitat primarily through advocacy and education.

The Izaak Walton League of America is a national conservation organization of 45,000 members. It was incorporated in the State of Illinois in 1922 in order to conserve, maintain, protect, and restore the soil, forest, water and other natural resources of the United States.

The National Audubon Society is a nonprofit, national membership organization dedicated to the conservation of wildlife and other natural resources. Since the turn of the century, National Audubon has been active in efforts to protect migratory birds and their habitat. National Audubon has over one half million members and owns and manages a nationwide system of wildlife sanctuaries.

The Natural Resources Defense Council, Inc. ("NRDC") is a national environmental organization with over 48,000 members. NRDC is dedicated to preserving, protecting, and defending the environment and has actively worked to minimize and prevent environmental harm.

The National Wildlife Federation is a nonprofit membership organization incorporated in 1939 under the laws of the District of Columbia. The Federation is the largest nongovernmental conservation education organization in the world, with affiliates in 50 states and three territories. Its 4.1 million members and supporters are dedicated to increasing public awareness of the need for wise use, proper management, and conservation of wildlife and other natural resources.

The Colorado Wildlife Federation, Minnesota Conservation Federation, New Mexico Wildlife Federation, South Dakota Wildlife Federation, and Wyoming Wildlife Federation are statewide nonprofit organizations affiliated with the National Wildlife Federation, whose goals and objectives they share.

AMICUS CURIAE

BRIEF

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No. 85-246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner

v.

DWIGHT DION, SR.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF ON THE MERITS OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

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Brief of Amicus Curiae International Association of Fish and Wildlife Agencies

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The International Association of Fish and Wildlife Agencies, having obtained and filed written consent of all parties to the case as required by paragraph 2 of Rule 36, submits this brief in support of the position of petitioner United States of America.

INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies (hereinafter "the International Association") is a quasi-governmental organization of public agencies engaged in protection and management of the

fish and wildlife of North America. Founded at Yellowstone National Park in 1902, government members of the International Association include the fish and wildlife agencies of all fifty states and eight Canadian provinces as well as the federal and dominion fish and wildlife services of the United States and Canada. Since its founding the International Association has been a key instrumentality in promoting principles of sound resource management and in strengthening federal-state cooperation in the protection and management of fish and wildlife. It files this brief urging reversal of the decision of the Eighth Circuit that the prohibitions of the Endangered Species Act and of the Bald Eagle Protection Act are not applicable to on-reservation taking of protected species for personal consumption by Indians possessing a treaty right to hunt and fish.

States have a substantial interest in the fish and wildlife found within their borders, and the protection of this interest is a matter of public concern to the whole people of the state. *Illinois Central R. Co.* v. *Illinois*, 146 U.S. 387, 455 (1892). In the United States the final responsibility for preservation of fish and wildlife resides in the states. Whereas the police power of the state in respect of fish and wildlife was originally viewed as flowing from the duty of the state to preserve for its people a valuable food supply, *Geer* v. *Connecticut*, 161 U.S. 519, 534-535 (1896), the preservation of all life forms is now viewed as being of ecological and scientific value as well. Along with the knowledge that hundreds of wildlife species have been lost to the progress of modern civilization comes the increasing awareness that each species possesses a distinctive collection of genes, the hereditary mate-

rials in their makeup from thermoregulatory systems to biodynamic compounds, that enable them to survive in particular environments.[1]

The Desert pupfish, apparently confined to a few waterholes in California and Nevada, can tolerate temperatures as low as 1°C and as high as 42°C while surviving in water with a salt content of 70 parts per 1000, twice the salinity of seawater. A 1977 National Science Foundation study reported:

> The extreme conditions of the pupfish habitats tell us something about the creature's extraordinary kidney function and thermoregulatory sys-

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[1]Related is the awareness that complex and diverse ecosystems are more stable and possess greater compensatory resources to resist invasion from foreign sources than simple systems with a few dominant species. The risks associated with genetic vulnerability in the area of major crops have led to establishment by the Department of Agriculture of the national plant germplasm system at Ft. Collins, Colorado, to meet national needs for plant genetic resources. See U.S. General Accounting Office, Better Collection and Maintenance Procedures Needed To Help Protect Agriculture's Germplasm Resources, CEO-82-7 (1981). Crops become genetically vulnerable because of the uniformity demanded by society. The market demands an inexpensive and uniform product—uniform as to size, shape, maturity date and the like—and rewards the farmer and the plant breeder who can produce it. Uniformity of product means uniformity in the genetics of the crop and if the genes of this uniformity happen to make the crop susceptible to disease, an epidemic is in the making. National Academy of Sciences, Genetic Vulnerability of Major Crops, 15, 29 (1972) (hereinafter "NAS Study"). According to the National Academy of Sciences, there are fifty varieties of peas but 96 percent of the 1969 pea crop in the United States was planted to only two such varieties. NAS Study, 286-287. The National Academy concluded that "most major crops are impressively uniform genetically and impressively vulnerable." NAS Study, 1.

> tem. . . . They can serve as useful biological models for future research on the workings of the kidney in humans, and on the prospects for human survival in seemingly hostile environments—and man, in the opinion of many ecologists, will need all the help he can get in understanding and adapting to arid areas that are expanding around the earth.

N. Myers, *A Wealth of Wild Species* 116 (1983) (hereinafter "Myers"), citing National Science Foundation: *The Desert Pupfish and Human Kidney Research*, Mosaic, January/ February 1977. The highly developed heart and circulatory system of the albatross permits it to accomplish an immense annual migration. Studies of the albatross have advanced understanding of cardiomyopathy, a failure in humans caused by overdevelopment of the heart muscle which obstructs blood outflow.[2]

The endangered Florida manatee, long protected by the state,[3] possesses blood with poor clotting capability, a trait useful in hemophilia research.[4] From a standing start the cheetah can accelerate to 70 km. per hour in a few strides and is able to maintain a 100 km. per hour chase for several hundred meters. Study of the cheetah's efficient heart and its finely tuned respiratory and circulatory systems may assist the treatment of heart disease, blood pressure, and circulatory disorders in humans.[5]

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[2]Myers, at 6.

[3]Florida Manatee Sanctuary Act, § 370.12, Fla. Stat. (1983).

[4]Myers, at 123.

[5]Myers, at 170-171.

Any reduction in natural resource stocks represented by species reduces opportunities for scientific advancement and, in consequence, a diversity of life forms may well rank among a state's most important natural resources. Once a species is lost, its reservoir of genetic characteristics cannot be replaced or reproduced artificially. This awareness has resulted in enactment of state laws for the protection of species of fish and wildlife naturally occurring within their borders which are threatened with extinction. By 1973, the year Congress enacted a comprehensive endangered species program, 35 states had established protective laws for endangered species.[6] Typical of the basis for current state legislation is the declaration of policy in the Florida statute:

> The Legislature recognizes that the State of Florida harbors a wide diversity of fish and wildlife and that it is the policy of this state to conserve and wisely manage these resources, with particular attention to those species defined by the Game and Fresh Water Fish Commission, the Department of Natural Resources, or the U.S. Department of the Interior, or successor agen-

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[6]During Senate debate on S.1983, 93d Cong., (1973), eventually enacted as the Endangered Species Act of 1973, Senator Tunney, floor manager of the bill, observed: "Presently, 35 States provide protection for endangered species. In most of these States, their laws are as strong or stronger than the provisions of this bill. In the others there are strong management programs. Only 15 States do not now provide some protection for endangered species." A Legislative History of the Endangered Species Act of 1973, As Amended In 1976, 1977, 1978, 1979 and 1980, 97th Cong., 2d Sess., Senate Committee on Environment and Public Works 385 (Comm. Print 1982) (hereinafter cited as "Legislative History").

> cies, as being endangered or threatened. As Florida has more endangered and threatened species than any other continental state, it is the intent of the Legislature to provide for research and management to conserve and protect these species as a natural resource.

Florida Endangered and Threatened Species Act of 1977, § 372.072, Fla. Stat. (1983). At the federal level these same concerns culminated in enactment of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543, characterized by this Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 180 (1978). Capturing the concerns expressed in the legislative hearings of 1972 and 1973, the House Report stated:

> From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own —genetic heritage.
>
> The value of this genetic heritage is, quite literally, incalculable. The blue whale evolved over a long period of time and the combination of factors in its background has produced a certain code, found in its genes, which enables it to reproduce itself, rather than reproducing sperm whales, dolphins, or goldfish. If the blue whale, the largest animal in the history of this world, were to disappear, it would not be possible to

> replace it—it would simply be gone. Irretrievably. Forever.

H.Rep. No. 412, 93d Cong., 1st Sess. 4 (1973), *reprinted in*, Legislative History, at 143.

The Endangered Species Act provides for a coordinated federal-state approach to the conservation of endangered species, those in danger of extinction throughout all or a significant portion of their range, and threatened species, those likely to become endangered within the foreseeable future throughout all or a significant portion of their range. 16 U.S.C. §§ 1532(6), (20). Section 4(c) of the Act directs the Secretary of the Interior to publish lists of species determined by him to be endangered or threatened, 16 U.S.C. § 1533(c)(1), and the Secretary's determination must be made on the basis of the best scientific and commercial data available to him. 16 U.S.C. § 1533(b)(1)(A).

Section 6 of the Act directs the Secretary of the Interior to cooperate with the States to the maximum extent practicable in carrying out the endangered species program, and further directs the Secretary to enter into cooperative agreements with any state that maintains an "adequate and active" program for the conservation of endangered and threatened species. 16 U.S.C. §§ 1535(a), (c). An essential predicate to an adequate and active state program is a finding by the Secretary that the state wildlife agency possesses authority to conserve resident species of fish or wildlife determined "by the state agency or the Secretary" to be endangered or threatened. 16 U.S.C. § 1535(c)(1)(A). In consequence of this tightly woven federal-state scheme, the Secretary maintains lists of

fish and wildlife species endangered or threatened throughout all or significant portions of their range and the states maintain lists of species endangered or threatened statewide. Forty states, including South Dakota, now have cooperative agreements with the Secretary under section 6 of the Act.

The Eighth Circuit in the instant case held that the prohibitions of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), and of the Bald Eagle Protection Act, 16 U.S.C. § 668(a), are not applicable to the taking on the Yankton Sioux Reservation of bald eagles and other protected birds by respondent, an enrolled member of the Yankton Sioux tribe. The court of appeals found that respondent Dion possessed a treaty right to hunt eagles on the reservation for personal use and that, unless Congress expressly abrogated Indian hunting rights, the prohibitions of the Endangered Species Act and the Bald Eagle Protection Act are not applicable to respondent for acts committed on the reservation. Because it could not find such an express reference in the statutory language or the legislative history of either statute, the Eighth Circuit vacated respondent's convictions for violations of the statutory prohibitions.

In the view of Amicus International Association, the court below was mistaken in its reading of congressional intent. We believe further that the court of appeals invaded the legislative province in requiring that Congress reflect its intention in the particular manner designated by the court. The essence of endangered species protection is that certain fish and wildlife have become so depleted that the species itself is threatened with extinction. In such circumstances, each remaining individual must be accorded special

protection and taking must be prohibited. Congress in the Endangered Species Act of 1973 plainly intended that the nation's best efforts be engaged to reverse the loss of wildlife species.

The Eighth Circuit's technical reading defeats congressional intent to protect, except in certain narrowly limited and controlled situations, all individuals of an endangered species. Almost any taking of endangered species, and certainly unregulated taking, jeopardizes federal and state recovery efforts. In some instances the taking of even one or two individuals per year could lead to extirpation of a species from a state. Moreover, a decision like that in the instant case has ramifications beyond the area of recognized immunity by undermining detection of illegal carcasses and parts in states where Indian reservations can be claimed as the point of origin and where take for commercial purposes can be claimed to be take for personal use.

Numerous species of fish and wildlife listed by the Secretary and/or by the States as endangered or threatened occur on the more than 50 million acres of Indian land in the United States.[7] As of January 3, 1983, a total of 263 Indian reservations in the United States was established pursuant to treaties, executive orders, acts of Congress, Secretarial orders, and court decisions. In the examples which follow, each of the species listed ranges on and off reservation lands or waters onto surrounding lands or waters. For each of the species listed below the percentage of its habitat within the state represented by

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[7]Bureau of Indian Affairs, U.S. Department of The Interior, Annual Report of Indian Lands 3 (1981).

reservation lands or waters is set forth where estimates can be made.[8]

Arizona. In Arizona, Indian lands total 19.9 million acres or approximately a quarter of the total area of the state.[9] The following species listed by the Secretary as endangered or threatened occur on these lands: Brown pelican (Endangered, 5% habitat on reservation); Wood stork (End., 20%); Aleutian Canada goose (End., 60%); Bald eagle, breeding population (End., 20%); Bald eagle, wintering population (End., 30%); Yuma clapper rail (End., 16%); Sonoran pronghorn (End., 5%); Gila topminnow (End., 10%); and Apache trout (Threatened, 80%). Except for the first two species listed, each of these species uses reservation habitat during its breeding season thereby making such habitat particularly important to survival of the species in the state.

California. Indian lands in California total approximately 570,000 acres.[10] One hundred percent of the population of the California condor, listed by the Secretary and by the state as endangered, occurs on Indian land. The following species listed by the state as endangered or threatened range on and off Indian lands and waters in California. Indian lands probably

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[8]Values listed for habitat percentages are estimates provided by the state fish and wildlife agency of the subject state. These values vary by season and year as well as in response to weather patterns and population and prey base cycles. Copies of the state submissions have been lodged with the clerk and made available to counsel for the parties.

[9]Supra note 7, at 2; Bureau of the Census, U.S. Department of Commerce, Statistical Abstract of the United States: 1981, at 197.

[10]Supra note 7, at 2.

comprise five to ten percent of their habitats: Humpback sucker (End.); Desert pupfish (End.); Elf owl (End.); Least Bell's vireo (End.); Peninsular Bighorn Sheep (Thr.); Stephen's Kangaroo Rat (Thr.); Southern Rubber Boa (Thr.); and the Yellow-Billed Cuckoo (Thr.).

Colorado. Indian lands in Colorado total approximately 756,000 acres.[11] There are two Indian reservations in Colorado, the Mountain Ute Reservation in the southwestern corner and the Southern Ute Reservation along the southern boundary. The Bald eagle and the Peregrine falcon, both listed by the state as endangered as well as being on the federal list, range on and off the reservations onto surrounding lands.

Florida. The Florida panther is listed as endangered on both the Secretary's list and that of the state. It is estimated that less than fifty individuals of this species survive in the wild, making the Florida panther one of the most endangered of all listed species. It is estimated also that Indian lands in Florida constitute approximately eight percent of panther habitat. In December, 1983 one James Billie, an enrolled member and a chief of the Seminole Tribe, was arrested by state wildlife officers and charged with a violation of state law for the killing of a Florida panther on the Seminole Reservation. Relying in part on the decision of the Eighth Circuit in *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985), the Florida state court dismissed the case against Billie. *State* v. *Billie*, No. 83-202 (20th Judicial Cir. for Hendry County, July 9, 1985). The state has taken an appeal.

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[11]Ibid.

Idaho. Indian lands in Idaho total approximately 825,000 acres.[12] The following species migrate through or winter on reservation land: Whooping crane (End., 10%); Bald eagle (End., 5%); Peregrine falcon (End., 15%). "Summer" and "fall" chinook salmon which pass through the Nez Perce Indian Reservation are now listed by the state as threatened species.

Minnesota. Indian lands in Minnesota total approximately 764,000 acres.[13] Approximately ten percent of the range within the state of the threatened Gray wolf is on reservation lands. The endangered Peregrine falcon migrates through reservation land in Minnesota but does not nest on such lands. Bald eagles, which are listed as threatened in Minnesota, nest on reservation lands. Of 226 Bald eagle nests known to exist in 1985, 14 nests occur on reservations.

Montana. Indian lands in Montana total approximately 5.2 million acres.[14] The following species occur on Indian reservations: Gray wolf (End., 5%); Peregrine falcon (End., 10%); Bald eagle (End., 3%); Whooping crane (End., casual migrant); and Grizzly bear (Thr., 5%). Reservation lands in Montana are essential to recovery of the Gray wolf, serving as part of a travel corridor for dispersal of wolves.

Nevada. Indian lands total 1.2 million acres.[15] In Nevada, the Bald eagle and the Peregrine falcon are the two terrestrial species listed as endangered. Nevada currently supports approximately 150 wintering

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[12]Ibid.

[13]Supra note 7, at 2.

[14]Supra note 7, at 2.

[15]Supra note 7, at 3.

Bald eagles and only one nesting pair of Peregrine falcons. A small portion of the state's wintering eagle population, less than ten percent, depend on reservation land for foraging and roosting.

New Mexico. Indian lands in New Mexico constitute approximately 7.5 million acres or about ten percent of the land area of the state.[16] The following species listed by the Secretary (along with the percentage of habitat within the state represented by Indian lands) occur on Indian lands in the state: Black-footed ferret (End., 10%); Peregrine falcon (End., 5-10%); Bald eagle (End., 5%); Whooping crane (End., less than 5%); and Colorado squawfish (End., 50%). The New Mexico Department of Fish and Game reports that habitat represented by Indian land is important habitat for the Black-footed ferret and that for the Colorado squawfish is among the best potential habitat in the state.

North Dakota. Indian lands within the state total approximately 850,000 acres.[17] The following species are reported to occur on reservation lands during periods of migration: Bald eagle (End.); Interior least tern (End.); and Whooping cranes (End.).

Oklahoma. According to BIA, Indian lands in Oklahoma total approximately 1.2 million acres.[18] Such lands include literally thousands of tracts located in a majority of the 77 counties of the state. The Oklahoma Department of Wildlife Conservation reports that the following species range on and off Indian

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[16]Ibid.

[17]Ibid.

[18]Ibid.

lands but that, owing to the unconsolidated nature of the tracts, it is not possible to estimate the amount of habitat represented by Indian land: Gray bat (End.); Indiana bat (End.); Ozark big-eared bat (End.); Peregrine falcon (End.); Bald eagle (End.); Whooping crane (End.); Interior least tern (End.); Red-cockaded woodpecker (End.); American alligator (End.); Leopard darter (Thr.); and Ozark cavefish (Thr.).

Oregon. Indian lands in Oregon total approximately 760,000 acres.[19] Both the Bald eagle, listed in Oregon as threatened, and the Peregrine falcon, listed as an endangered species on the federal and state lists, are found foraging and passing over reservation lands within the state.

South Dakota. Indian lands in South Dakota total over 5 million acres and comprise approximately ten percent of the total area of the state.[20] The following species listed by the state as endangered or threatened range on and off reservation lands: Black-footed ferret (End.); Pearl dace (End.); Peregrine falcon (End.); Whooping crane (End.); Bald eagle (End.); Interior least tern (End.); Osprey (Thr.); Mountain lion (Thr.); River otter (Thr.); and Swift fox (Thr.). For two days in October 1985, seven Whooping cranes used a portion of the Standing Rock Reservation as a stopover site during the annual fall migration through South Dakota.

Utah. Indian lands in Utah total approximately 2.3 million acres.[21] The following protected species occur

[19]Ibid.

[20]Ibid.

[21]Ibid.

on Indian reservations in Utah: Peregrine falcon (End., 10%); Bald eagle (End., 12%); Black-footed ferret (End., 20%); Desert tortoise (Thr., 5%); and Colorado squawfish (End., 10%).

Wisconsin. Indian lands in Wisconsin total approximately 400,000 acres.[22] The following endangered or threatened species (along with estimates of total habitat within the state represented by reservation habitat) are found within the boundaries of Indian reservations within the state: Bald eagle (End., 10%); Osprey (End., 10%); Cooper's hawk (Thr., 5%); Red Shouldered hawk (Thr., 5%); Wood turtle (Thr., 5%); Longear sunfish (Thr., 10%); Pine marten (End., 5%); and Canada lynx (End., 10%). Each of these species ranges on and off Indian reservations with the possible exception of the wood turtle populations on the Bad River and Stockbridge Reservations.

The following endangered and threatened species occur to a lesser degree on Indian lands or waters in Maine (Bald eagle, Peregrine falcon); Michigan (Great Lake cisco, Thr.); Mississippi (American alligator, Black bear, Red-cockaded woodpecker, Gopher tortoise); Nebraska (Bald eagle, Peregrine falcon, Interior least tern, Flying squirrel (Thr.), and Piping plover (Thr.)); and Wyoming (Bald eagle, Peregrine falcon, Grizzly bear, and Black-footed ferret).

It is evident from the foregoing that numerous endangered and threatened species occur on Indian reservations. In the circumstances, the endangered species program would be seriously undermined if the prohibitions of the act are not applicable in the face of Indian hunting and fishing rights.

[22]Ibid.

SUMMARY OF ARGUMENT

1. Numerous decisions of this Court hold that treaty rights to hunt and fish are subject to state conservation laws which are reasonable and necessary. These decisions apply to on-reservation as well as off-reservation hunting and fishing rights. *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165 (1977). Congress can hardly be possessed of a lesser power in respect of Indian rights when exercising its authority under the Constitution to enact a conservation measure.

2. If abrogation or modification of the treaty right is required, Congress' intention to do so was clearly expressed without the necessity for an express statement that Indian hunting and fishing rights were being modified. The purpose of Congress in the Endangered Species Act, the ultimate touchstone, was to halt the extinction of species of fish and wildlife and an uncontrolled treaty right to take such species is plainly repugnant to the congressional purpose. The provision of the Bald Eagle Protection Act authorizing issuance of permits to take eagles for Indian religious purposes also makes clear that Congress intended the prohibitions of that act to be applicable to Indians with treaty rights to hunt and fish.

ARGUMENT

1. Treaty Rights to Hunt and Fish on Indian Reservations Are Subject to Reasonable and Necessary Conservation Laws And Exercise of the Treaty Right May be Regulated in the Interest of Conserving Fish and Wildlife

Numerous decisions of this Court hold that Indian treaty rights to hunt and fish are subject to state conservation laws which are reasonable and necessary and which do not discriminate against Indians. *Oregon Dept. of Fish & Wildlife* v. *Klamath Indian Tribe*, ___ U.S. ___, 87 L.Ed.2d 542, 554 (1985); *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 684 (1979); *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 171 (1977) (*Puyallup III*); *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975); *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44, 49 (1973) (*Puyallup II*); *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392, 399-400 (1968) (*Puyallup I*); *Tulee* v. *Washington*, 315 U.S. 681, 684 (1942); *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916); *United States* v. *Winans*, 198 U.S. 371, 384 (1905). These decisions apply to on-reservation as well as to off-reservation fishing rights. As stated by Justice Stevens in *Washington* v. *Fishing Vessel Ass'n*,

> In support of our holding [in Puyallup III] that the State has regulatory jurisdiction over on-reservation fishing, we reiterated Mr. Justice Douglas' statement for the Court in Puyallup II that the "Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

443 U.S. at 684. The Indian fishing rights in these cases are rights secured in treaties with the United States and, as such, are federal rights which have nonetheless been subjected to appropriate state conservation laws. States are not free to abrogate treaties and, because the Supremacy Clause requires invalidation of state legislation that burdens or conflicts with federal laws or treaties, *De Canas* v. *Bica*,

424 U.S. 351, 357 n.5 (1976), it is apparent that the application of appropriate state conservation laws is not deemed by the courts, at least not this Court, to constitute abrogation of a treaty or to be in conflict with the federal right to hunt and fish.

State regulation of the exercise of the federal fishing right is reconciled either by adopting the view that treaties bestow no right to pursue endangered wildlife or, to equal effect, by taking the view that the treaty right is subject to the inherent police power of the state to protect the public welfare in a matter of such signal importance as the conservation of wildlife.[23] In none of the cases cited did this Court require abrogation or modification of the treaty before state

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[23]As stated by Justice Douglas in Puyallup II, "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." 414 U.S. at 49. The police power is broadly described as the inherent power of government to promote public welfare by restraining and regulating the uses of liberty and property. E. Freund, The Police Power, iii (1976) (hereinafter "Freund"). The essential justification of the police power is that each individual in society must submit to such restraints in the exercise of liberty or in the rights of property as may be required to remove or reduce the danger of abuse of such rights. Freund, 6. While it would certainly go too far to say that a treaty may not diminish the scope of the police power of a state, the power of a state to enact measures essential to the health and safety of its people will not readily be deemed by the courts to have been contracted away. E.g., Campagnie Francaise v. Board of Health, 186 U.S. 380, 394 (1902). Thus in Puyallup II the Court observed that if treaty fishermen were allowed untrammeled on-reservation fishing rights they could frustrate the rights of non-Indian citizens recognized in the Treaty of Medicine Creek. 433 U.S. at 177.

conservation laws could apply to regulate the exercise of the Indian right. Neither did the Court in the cases cited indicate that a claim for compensation would lie in consequence of state regulation of the exercise of the treaty right. In exercising its authority under the Constitution to enact a conservation measure, Congress could hardly be possessed of a lesser power in respect of Indian rights.

2. If Abrogation or Modification of the Treaty Right Is Required, Congress Clearly Expressed Its Intention to Do So in the Endangered Species Act and the Bald Eagle Protection Act

A treaty between the United States and an Indian tribe is deemed to be a contract between two sovereign nations. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). Treaties and acts of Congress are accorded equal weight by the Constitution as domestic law and, in consequence, an act of Congress enacted subsequent to an international agreement supersedes the agreement as domestic law. Repeal by implication is not favored, however, and this Court has frequently held that the purpose of Congress to supersede a treaty provision must be clearly expressed. *E.g.*, *Menominee Tribe v. United States*, 391 U.S. 404 (1968). But this rule of construction must give way before an intention clearly expressed and in the Endangered Species Act the intention of Congress to halt the decline of species was expressed clearly and emphatically. Congressional intent in the Bald Eagle Protection Act to limit Indian hunting rights is also manifest. Taking of an endangered species, wherever

the taking occurs, is thus repugnant to the congressional purpose.

This Court has characterized the Endangered Species Act of 1973 as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 180 (1978), and as "affording endangered species the highest of priorities." 437 U.S. at 194. This broad scope notwithstanding, the court below held that Congress failed to abrogate treaty hunting rights in the Endangered Species Act: "We cannot find an express reference to Indian treaty hunting rights showing congressional intent to abrogate or modify such rights in either the statutory language or legislative history of this Act." *United States* v. *Dion*, 752 F.2d at 1269. In addition to applying the so-called "express reference" test, the court below noted that even if it were to "look for congressional intent to abrogate or modify treaty rights in less reliable sources," it would reach the same conclusion. 752 F.2d at 1269. In the view of amicus curiae, Congress spoke with unaccustomed strength in the Endangered Species Act and clearly intended to abrogate or modify treaty hunting and fishing rights. This claim of repeal is based on the following grounds.

A. *The Language of the ESA Prohibition.* Section 9 of the Endangered Species Act proscribes classes of conduct which could directly touch on endangered species, and paragraph (B) of subsection (1) thereof declares it unlawful for any person subject to the jurisdiction of the United States to "take any such species within the United States or the territorial sea of the United States." 16 U.S.C. 1538(a)(1)(B). Po-

sitive repugnance exists between this provision and the treaty hunting right.

B. *The Exception Provisions.* Section 10 of the Endangered Species Act provides that permits for the intentional taking of an endangered species may be granted for only two reasons: for scientific purposes and to enhance the propagation or survival of the affected species. 16 U.S.C. § 1539(a)(1)(A). In addition to such takings, taking by Alaska Natives for purposes of subsistence is exempted from the provisions of the act by section 10(e), 16 U.S.C. § 1539(e), but the Secretary may regulate such taking on a finding that endangered or threatened species taken for subsistence are being materially and negatively affected. 16 U.S.C. § 1539(e)(4).

The Endangered Species Act is thus composed of sweeping prohibitions and narrowly framed exceptions. Of specific relevance to the instant inquiry is that in each case where taking of an endangered species is permitted by statute the activity is subjected to government control. Taking for scientific or propagation purposes requires a permit from the Secretary and subsistence take by Alaska Natives, which is exempted from the provisions of the act, may be subjected to the act upon the appropriate finding by the Secretary. The scheme of the act is thus to permit intentional taking in limited circumstances and to provide back-up authority to control exempted taking by Alaska Natives, if conditions warrant. That Indian hunting which could substantially affect endangered species would remain wholly unregulated flies in the face of and is repugnant to the congressional scheme.

C. *Congress Refused to Exempt American Indians.* Comprehensive endangered species legislation was

considered in both the 92d and 93d Congresses before being enacted by the latter Congress. H.R. 13081, the Administration bill introduced in early 1972 as part of President's Nixon's environmental program, contained a broad prohibition against the taking of endangered species but section 5(a)(2) of the bill exempted American Indians who take endangered species for their own consumption pursuant to a treaty.[24] The Administration bill on the Senate side, S.3199, 92d Cong., 2d Sess. (1972), similarly exempted American Indians from the taking prohibitions and, of the other two bills considered during Senate hearings, S.249 and S.3818, the former bill introduced by Senator Cranston also exempted Indians but only in connection with taking for religious purposes. § 5(b)(6), S.249, 92d Cong., 2d Sess. (1972).

In the 1972 House hearings on H.R. 13081, the Subcommittee on Fisheries and Wildlife specifically addressed questions to Administration witnesses on the "loophole" which would be established by the Indian exemption. The Subcommittee was troubled by the proposed exemption and observed that demise of a population or species would in the long run be to the injury of the Indians. *Endangered Species: Hearings Before the Subcomm. of the House Committee on Merchant Marine & Fisheries,* 92d Cong., 2d Sess. 144 (1972). In a subsequent written submission the Interior Department urged the House Subcommittee

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[24]Section 5(a)(2) of H.R. 13081, 92d Cong., 2d Sess. (1972) provided:

> The prohibitions contained in this section shall not apply to American Indians, Aleuts, or Eskimos who take endangered species for their own consumption or ritual purposes in accordance with a treaty or pursuant to Executive order or Federal statute.

144 (1972). In a subsequent written submission the Interior Department urged the House Subcommittee to resolve the Indian question expressly if it chose to extinguish treaty-secured rights else such rights would continue to be preserved. *Ibid.* That judgment was obviously premature.

The 93d Congress again addressed the subject of endangered species protection. This time the Administration bills, H.R. 4758 and S. 1983, contained no exemption for taking by American Indians, and no such exemption was contained in H.R. 37, 93d Cong., 1st Sess. (1973), which, as amended, passed the House or in S.1983, 93d Cong., 1st Sess. (1973), which, as amended, passed the Senate. The Senate bill in section 11(d) contained an exception for subsistence take by Alaska Natives and this provision was accepted by the House in conference and later enacted into law. § 10(e), 87 Stat. 897, as amended, 16 U.S.C. § 1539(e). The closing of the Indian "loophole" by revision of the Administration bill in direct response to subcommittee concern is strong indication that Congress did not intend to permit Indians to take endangered or threatened species. Moreover, enactment by Congress of a specific exemption for subsistence take by Alaska Natives provides a compelling basis for applying the maxim *expressio unius est exclusio alterius.* See *Tennessee Valley Authority* v. *Hill,* 437 U.S. at 188. When Congress meant to exempt a class of persons it did so explicitly.

D. *Indian Religious Purpose Permits Under the Bald Eagle Protection Act.* The Eagle Protection Act declares that "whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this sub-

chapter" shall knowingly take any bald eagle shall be fined not more than $5,000 or imprisoned not more than one year or both. 16 U.S.C. §§ 668(a). The Eagle Protection Act authorizes the Secretary to issue a permit to take a bald eagle "for the religious purposes of Indian tribes" if the Secretary after investigation shall determine "that it is compatible with the preservation of the bald eagle" to permit such taking. 16 U.S.C. 668a. The court below held that Congress had failed in the Eagle Protection Act to abrogate treaty hunting rights just as it had failed to do so in the Endangered Species Act.

According to the court of appeals, "the only possible indicator" of an intent to abrogate lay in the 1962 amendment which authorized the Secretary to permit taking of eagles for religious purposes. *United States* v. *Dion*, 752 F.2d at 1270. The court dismissed the permit provision as an indicator, however, by construing it to be available to persons other than Indians: "In other words, it [the permit provision] could have been deemed necessary to permit non-Indians to hunt eagles, on or off a reservation, in order for the Indian tribes to obtain enough eagle parts for their religious needs." 752 F.2d at 1270. To put the matter charitably, the Eighth Circuit's tortured interpretation is simply inadmissible.[25]

In sum, several clear expressions of congressional intent were available to the court of appeals but it

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[25]The Secretary's permit regulations make clear that no person may take, possess or transport a bald eagle or parts thereof without a valid permit and that applications for Indian religious purpose permits will be accepted only from individual Indians. 50 C.F.R. 22.11, 22.22(a).

gress, the ultimate touchstone, to reverse the loss of wildlife species by, among other things, controlling take thereof. As Justice Holmes stated in a similar case involving conflict between a treaty permitting transshipment of liquor through the United States and the later Volstead Act forbidding it, the letter of the statute is too strong. *Grogan* v. *Hiram Walker & Sons, Ltd.*, 259 U.S. 80, 89 (1922).

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 85-246

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

DWIGHT DION, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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~~**MOTION OF SEMINOLE TRIBE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND**~~
BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT DWIGHT DION, SR.

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MOTION OF SEMINOLE TRIBE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT DWIGHT DION, SR.

COMES NOW the Seminole Indian Tribe of Florida and moves this Court for leave to file a brief amicus curiae on behalf of respondent Dwight Dion, Sr.

The United States, in its brief on the merits in this case, at 32, n.35, has made a number of false and exaggerated statements concerning the pending case of *State v. Billie*, No. 83-202 (Fla.Cir.Ct. June 28, 1985). The government charges that members of the Seminole Tribe would hunt the Florida Panther to the point of extinction if the decision of the court below is allowed to stand. Be-

cause of the fact that this charge was not known to the Tribe until earlier this week, it was not possible for it to seek or obtain written consent to the filing of the attached amicus brief within the time limits specified in Rule 36 of the Supreme Court Rules.

The Seminole Tribe has a significant interest in correcting the misstatements made in the government's brief herein which, although not supported by *any* evidence of record in *any* proceeding, have injured the reputation of the Tribe and its members. In addition, the Tribe is concerned that this Court be aware of the true facts involved in the *Billie* case, so that the Court can avoid inadvertent statements or conclusions that could prejudice the defendant in that case in the event of a federal prosecution following termination of the state prosecution. Such a prosecution has been threatened by federal authorities if the state loses its appeal in that case. Finally, the Tribe has a strong interest in supporting tribal hunting and fishing rights such as those involved in this case.

Respectfully submitted,

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January 17, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-246

UNITED STATES OF AMERICA,
Petitioner,

v.

DWIGHT DION, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT DWIGHT DION, SR.

Pursuant to Rule 36.3, the Seminole Tribe of Florida, having its principal office at 6073 Stirling Road, Hollywood, Florida 33024, herewith presents its brief amicus curiae in support of the respondent in the above-captioned case.

INTEREST OF AMICUS CURIAE

The Seminole Tribe has a significant interest in correcting the misstatements made in the government's brief herein which, although not supported by *any* evidence of record in *any* proceeding, have injured the reputation of the Tribe and its members. In addition, the Tribe is concerned that this Court be aware of the true facts in-

volved in the *Billie* case, so that the Court can avoid inadvertent statements or conclusions that could prejudice the defendant in that case in the event of a federal prosecution following termination of the state prosecution. Such a prosecution has been threatened by federal authorities if the state loses its appeal in that case. Finally, the Tribe has a strong interest in supporting tribal hunting and fishing rights such as those involved in this case.

ARGUMENT

The United States Has Misstated The Position Of The Seminole Tribe With Respect To The Preservation Of Florida Panthers And Other Endangered Species.

The United States contends that there is a risk to other endangered and threatened species accessible to Indians who may wish to hunt them, *citing State v. Billie*, No. 83-202 (Fla.Cir.Ct. June 28, 1985) as an example of the risk involved. Govt. Br. at 32, n.35. Your amicus believes this Court should avoid any conclusions as to the facts of the *Billie* case or otherwise prejudge the factual or legal issues in that case, because it is a criminal case that has not been completed in the state courts, and which may yet be filed in the federal court.

Indeed, the government exaggerates the facts and effects of *Billie*. First, the state decision (that the information against defendant Billie would not lie) is now on appeal and may be reversed. If so, the state prosecution would resume. If not, and if this Court were to reverse the decision in the case below, a federal prosecution against defendant Billie has been threatened. Even if this Court affirms the decision below, there could still be a federal prosecution if the government wishes to try to show the taking in *Billie* was for commercial and not religious purposes.

Second, there is nothing in the record of the present case to support the government's undocumented assertions

as to the population and location of the Florida Panther, and defendant Billie should not be prejudiced, in event he is tried in state or federal court, by an inadvertent remark in this Court's opinion based on these unsubstantiated allegations.

Third, it is disingenuous for the government to suggest that the Seminoles assert the right to hunt panthers or other wildlife to the point of extinction. On the contrary, the Florida Panther is an animal sacred to the Seminoles and the Tribe is highly interested in its preservation, not its destruction.

The Seminole Tribe does not advocate hunting for panthers nor do its members regularly hunt for panthers. The taking of panthers by the Seminoles is not something that has regularly occurred since the 1920's, and would not be likely to recur in the future. We are advised that the record in the *Billie* case demonstrates that the taking or killing of the panther in that case was a rare and isolated incident; that the defendant Billie was not hunting specifically for a panther; that once the panther had been killed, its disposition was made according to a special and unique traditional religious ceremony. It is undisputed in *Billie*, and the state so stipulated, that the taking of the panther was not for commercial purposes. Nor could it be easily confused with commercial hunting. It is not at all similar to the taking of eagles, involved in the case below, where the defendant hunted and sold eagles on a recurring basis.

Finally, it is not true, as the government asserts, that broad federal regulation of on-reservation Indian hunting is the only way to protect endangered species which have a habitat that overlaps Indian reservation land. As held by the court below, your amicus believes that congressional intent to abrogate Indian tribal on-reservation hunting rights should not be implied; that congressional intent to abrogate must be clear on the face of the stat-

ute. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

The Seminole Tribe believes that any problems of the kind involved in the *Billie* case can best be solved by cooperative agreements for the protection of endangered species between the Seminole Tribe and state and federal agencies. Such agreements obviate jurisdictional conflicts and provide an effective means of endangered species protection without invasion of Indian rights. This has been specifically suggested to the appropriate state and federal agencies by the Tribe and the Tribe remains highly interested in the development of such agreements in order to protect Florida Panthers and other wildlife that are fundamental elements of the Seminole heritage.

Respectfully submitted,

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January 17, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 85-246

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

DWIGHT DION, SR.
Respondent.

BRIEF AMICI CURIAE OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN YOUTH COUNCIL, INC., WINNEBAGO TRIBE OF NEBRASKA AND CONFEDERATED SALISH AND KOOTENAI TRIBES OF MONTANA IN SUPPORT OF RESPONDENT.

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QUESTIONS PRESENTED

1. Has the right of Indians to take bald and golden eagles for cultural and religious purposes pursuant to treaties entered into with the United States and pursuant to the First Amendment to the United States Constitution been clearly and unambiguously abrogated by the Bald Eagle Protection Act, 16 U.S.C. 668, and the Endangered Species Act, 16 U.S.C. 1532?

2. Should the decisions of this Court in the *Puyallup* trilogy be applied here to prohibit Petitioner from regulating Indian treaty rights to take eagles for cultural and religious purposes unless it can be shown that such regulation is reasonable and necessary for the conservation of the species?

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INTERESTS OF AMICI CURIAE

Pursuant to Rule 36.2, the National Congress of American Indians, a corporation having its principal office at 804 D Street, N.E., Washington, D.C. 20002; the National Indian Youth Council, Inc., a non-profit corporation with offices located at 318 Elm Street, S.E., Albuquerque, New Mexico 87102; the Winnebago Tribe of Nebraska, P.O. Box 681, Winnebago, Nebraska 68071; the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Box 278, Pablo, Montana 59855; and the Mescalero Apache Tribe of New Mexico file the attached brief *amici curiae* in support of Respondent in the above-captioned case. The parties to this case have consented in writing to the filing of this brief, and a copy of their consent letters have been filed with the Court.

The National Congress of American Indians (NCAI) was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indians and Alaska Native people. NCAI and its membership have a profound concern with the ability of Indians and Indian tribes to protect their treaty recognized right to take plants and animals for cultural and religious purposes, rights similarly protected by the First Amendment to the United States Constitution. Such rights are critical to the survival of Indian tribes as distinct cultural entities.

The National Indian Youth Council, Inc. (NIYC) is a national, non-profit Indian organization which was founded in Gallup, New Mexico in 1961. Since that time NIYC has engaged in a number of organizing activities and legal challenges which have attempted to preserve and enrich traditional Indian communities and protect Indian

traditions on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of American Indian religions, including *Sequoyah v. T.V.A.*, 620 F.2d 1159.(6th Cir.), *cert. denied* 449 U.S. 953 (1980), and *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied* 452 U.S. 954 (1981).

The Winnebago Tribe of Nebraska and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana are federally recognized tribes of more than 10,000 members. The Tribes are participating as *amici* because of their interest in preserving the fundamental right to take plants and animals for cultural and religious purposes pursuant to treaties entered into over a century ago with the United States.

SUMMARY OF ARGUMENT

A principal issue in this case is whether Congress has abrogated an admitted treaty right to take eagles by the enactment of the Bald Eagle Protection Act (BEPA), 16 U.S.C. 668, and the Endangered Species Act (ESA), 16 U.S.C. 1531. Despite the absence of abrogation language or any plain indication in either act's legislative history to do so, the government finds an abrogation of that treaty right. That construction is wrong. More importantly, the reasoning used by the government to reach its conclusion runs contrary to basic tenets of federal Indian law.

Indian treaties and the rights secured by them are a fundamental part of the complex federal/Indian relationship. In many respects, treaties define the rights and duties of the parties and essentially determine the future relationship of the tribe to the federal government. Treaties with Indian tribes are accorded the same dignity

as that given to treaties with foreign nations. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). Cohen, *Handbook of Federal Indian Law* 63 (1982 ed.).

The right of tribes to hunt and fish without interference on their reservation has often been inferred and has always been accorded special protection by the courts. This special treatment is the result of recognition by the courts of the great reliance tribes place on their fish and game resources. *Winans v. United States*, 198 U.S. 371, 381 (1905) ("The [treaty] right to resort to the fishing places . . . not much less necessary to the existence of the Indians than the atmosphere they breathed.").

Plainly, the treaty right to take eagles cannot be dealt with in the backhanded manner here proposed by the government. The special status of treaty rights has long been recognized by this Court's rule which requires that Congress express its intent plainly to abrogate those rights on the face of the legislation or at least in the bill's legislative history. *The Leavenworth, Lawrence and Galveston Railroad Co. v. United States*, 92 U.S. 733, 741-42 (1876); *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938); *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968).

This rule is more than a mere cannon of construction. It is a vital protection for tribes' treaty rights that are most often simply overlooked in the day to day legislative and regulatory business of the United States. Congress has made clear in this very context that Indian policy is not to be set by inadvertance or oversight. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C 1996 (AIRFA).

The Petitioner suggests that the BEPA and the ESA have impliedly limited Respondent's treaty-secured right

to take eagles on his reservation but this is simply not the case. Neither the BEPA nor the ESA contains explicit language limiting Indian treaty rights to take eagles on reservations. Although Petitioner relies heavily on legislative history to support their position it will be shown that the legislative history does not contain the sort of firm Congressional statement that is required if Indian treaty rights are to be abrogated.

It is important to note what is *not* involved in this case. The Eighth Circuit drew a clear distinction between commercial sales and religious takings and held that commercial sales were not protected while religious and cultural takings were. *United States v. Dion,* 752 F.2d 1261, 1264-65 (8th Cir. 1985). It is therefore settled that commercial sales are not treaty protected activity and this issue is not before the Court.

If the BEPA and the ESA are nonetheless interpreted as limiting on-reservation treaty rights then decisions of this Court, as interpreted and applied by lower federal courts, call for the regulation of such rights only when the government has established by clear and convincing evidence that regulation is necessary for the conservation of the species. The record evidence in this case and other public documents reveals that such a showing cannot be made by the government. Not only does the government not have evidence of the impact of Indian treaty takings on eagles but recent evidence indicates numbers of eagles are on the increase. Under these circumstances any need to regulate the right is unproven, unwarranted and premature.

ARGUMENT

I.

THE BEPA DID NOT ABROGATE INDIAN TREATY RIGHTS.

The BEPA was enacted in 1940 and applied only to bald eagles. 16 U.S.C. 668(a). No reference was made to Indian treaty taking of eagles in this statute nor is there any discussion of Indian treaty rights in the 1940 act's legislative history. The Petitioner has not suggested otherwise.

In 1962, twenty-two years after adoption of the BEPA, Congress deemed it necessary to amend the act. The impetus for passage of the amendment was ***not*** related in any way with the impact on the bald or golden eagle by Indians exercising their treaty hunting rights. Rather, the reason for the amendment had to do with the wholesale slaughter of the golden eagle and the fact that protected immature bald eagles bore an often fatal likeness to unprotected golden eagles. Sheep ranchers, particularly in the Texas region, saw the golden eagle as a predator that was responsible for herd depredation. Bounties were placed on golden eagles which led to their wholesale slaughter.[1]

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[1]The following testimony was received during the hearings on the amendment:

> Mr. Lennon: Who was the gentleman you were referring to with 4,000 [eagles] killed?
>
> Dr. Spofford: This is J.O. Casperas of Alpine, Texas.
>
> Mr. Lennon: This man i am reading about in this article is W.W. Hardough, a Fort Stockton pilot who killed 149 eagles during the month of January 1961.
>
> Dr. Spofford: I believe he is a newcomer. He has been doing it a relatively few years.

(Continued on following page)

The Petitioner implies that the killing of eagles on Indian reservations was a significant factor in the adoption of the 1962 amendment, but the legislative history reveals no such concern. While Indian ceremonial and cultural use was occasionally cited in the House and Senate Reports as a market for eagle feathers *after* the eagles were killed, the primary impetus for the taking was attributed to ranchers' needs to reduce the eagle populations and their supposed impact on herd size. The floor debate in both the House and Senate was dedicated to this issue and not to Indian treaty takings.

The Petitioner also suggests that the Department of the Interior vigorously advocated passage of the amendment but made their support contingent upon adoption of language providing for continued Indian religious and ceremonial use of eagle feathers. Petitioner's Brief, pp. 26, 27. The legislative history shows this not to be the case.

First of all, the Indian religious use was only one of several points raised by the Department. It was not their primary focus — enforcement was. Secondly, the Department merely suggested that some regulatory mechanism be implemented to assure that religious use be clearly

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(Continued from previous page)

> Mr. Lennon: He gets a bounty from the sheep ranchers and he is probably permitted to sell them to people who develop them in the tourist trade.
>
> Dr. Spofford: That is correct. . . .

Miscellaneous Fish and Wildlife Legislation: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 2d Sess. 39 (1962).

protected.[2] In no way was Departmental support contingent upon adoption of the Indian use provision.

The Department's letter cited by the Petitioner said nothing about treaty hunting rights nor did it suggest that treaty protected taking of eagles would be affected by the legislation. There is no showing in the legislative record that Congress actually considered how or even if the legislation would affect treaty hunting rights.

What is perhaps most significant is that no tribe testified for or against the bill. There is no indication on the record that the impact of the bill on treaty hunting rights was ever considered or presented to Congress. While it is true that a special provision was included which specifically *protected* Indian religious and cultural use there was never any suggestion that treaty taking rights were being affected.

Not all Indian tribes have treaty secured hunting rights.[3] Although cases have indicated that there is no particular distinction between rights secured by Executive Order, statute or reservation use of eagle feathers, it is

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[2]What the Department's letter did say was that:

> In the circumstances, it is evident that the Indians are deeply interested in the preservation of both the golden and the bald eagle. If enacted, the bill *should* therefore permit the Secretary of the Interior, by regulation to allow the use of eagles for religious purposes by Indian tribes.

Letter from Assistant Secretary of the Interior, *reprinted in* S. Rep. No. 1986, 87th Cong., 2d Sess. 5, 6 (1962); H.R. Rep. No. 1450, 87th Cong., 2d Sess. 3 (1962); 108 Cong. Rec. 22272 (1962) (emphasis supplied).

[3]None of the tribes mentioned in the Department's letter are treaty tribes.

not altogether clear that such use is protected.[4] The amendment makes it clear that any such use is protected as long as Departmental regulations are adhered to. While the amendment provides protection for Indian cultural and religious use the legislative history provides no indication that treaty protected taking would be subject to the act or that any treaty abrogation was intended. Petitioner urges this Court to adopt precisely the sort of backhanded and indirect abrogation of treaty rights test that has already been considered and rejected by this Court. *Menominee, supra.*

II.

THE ESA DID NOT ABROGATE INDIAN TREATY RIGHTS.

The Endangered Species Act of 1973 was passed eleven years after passage of the BEPA amendment. This statute establishes a listing of fish, wildlife and plants species which are endangered or threatened with extinction. The listings are broad and include over 600 species of fish, wildlife and plants. 50 C.F.R. 17.11, 17.12. The bald eagle is listed as endangered while the golden eagle is threatened. *Id.*

The ESA contains a specific exemption for "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska . . . if such taking is primarily for subsistence purposes . . ." 16 U.S.C. 1539(e)(1)(B).

Petitioner essentially takes the position that this exemption is the *only* limited exemption permitted Indians

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[4]See People v. Woody, 61 Cal.2d 716, 394 P.2d 813 (1964), which determined that off reservation Indian use of peyote for traditional religious purposes was protected under the First Amendment.

and that all inconsistent treaty based rights are automatically abrogated. As will be shown, the legislative history does not evidence such an intent and the legislative language is subject to a contrary interpretation.

The situation of Alaska Natives has always been a singular and special one.[5] No treaties were negotiated with them, few reservations were established, and Congressional appropriations for Alaska natives were small. Cohen, *supra* at 739. Their exact status was only provided partial clarification by passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971. Pub.L.No. 92-203, 85 Stat. 688 (ratified as amended at 43 U.S.C. 1601-1628); Cohen, *supra* at 739-40. Although the adoption of ANCSA may have clarified some issues it only served to confuse the question of Native Alaskan hunting and fishing rights.

While it was clear that Native Alaskans largely lived in a subsistence economy, ANCSA specifically extinguished "any aboriginal hunting or fishing rights that may exist." 43 U.S.C. 1603(b); Cohen, *supra* at 758. The result of the adoption of the aboriginal hunting provision left many unanswered questions with respect to Native Alaskans' hunting and fishing rights. *Id.*[6] The same could not be said for the treaty protected rights of Indians in the lower forty-eight. There the rule was well settled that tribes continued to enjoy their treaty secured hunting rights until those rights were clearly abrogated by Con-

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[5]See Cohen, *supra* at 739-769; Case, David S., *Alaska Natives and American Laws* Ch. 1 (Univ. of Alaska 1984).

[6]While aboriginal rights may have been extinguished Congress clearly intended to preserve Native subsistance rights. See Conference Committee Report, S. 92-581, 92d Cong., 1st Sess. 37 (1971). The intent to preserve subsistance rights was clarified in 1980 by passage of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*

gress. *Menominee, supra; Antoine v. Washington,* 420 U.S. 194 (1975).

When Congress adopted the ESA, two years after the adoption of ANCSA, the above described exception clarified the position of Native Alaskans with respect to their hunting rights. Congress chose to make it clear that Native Alaskans possessed the same reservation-based hunting rights enjoyed by tribes in the lower forty-eight.

The legislative history shows that Congress was aware of the dependence of Native Alaskans on species such as the bowhead whale which would otherwise be protected. Congress chose to permit the taking of endangered species by Alaska Natives in recognition of the fact that the Alaskan Natives "depended on traditional hunting practices not only for sustenance but as a means for perserving social unity." *Endangered Species Act of 1973: Hearings on S.1592 and S.1983 before the Subcomm. on Environment of the Senate Comm. on Commerce,* 93rd Cong., 1st Sess. 126-27. 135 (1973). Of course, the same is true of Indians in the lower forty-eight states.

Although Congress was aware that protected plants, animals and fauna were to be found on Indian reservations, the legislative history evidences no attempt to determine what impact, if any, application of the ESA would have on treaty tribes. There is nothing in the legislative history of the ESA as adopted which indicates that Congress intended to do anything more than clarify the right of Native Alaskans to otherwise take protected species.

Congress was well aware that a clear legislative intent to extinguish treaty hunting rights was required because the cases establishing this principle had already been decided and because they had clearly been advised of this requirement by the Department of the Interior.[7]

In sum, the ESA on its face provides only that previously unclear hunting rights of Native Alaskans would be clarified at least to the extent that they involved endangered species. There is nothing in the legislative history which evidences a congressional intent to consider the complex problem of what to do about endangered species which are found on reservations let alone evidence any intent to summarily abrogate those rights without hearing from the affected tribes.

While the Petitioner cites a broad exemption which was considered under an earlier version of the ESA there is no showing that this broader exemption was considered and rejected by the Congress which actually enacted the ESA.[8]

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[7]As the Brief of the United States points out, the Department of Interior, in a 1972 letter to the Congress stated with regard to a prior version of the ESA that "[s]pecies may be endangered on Indian Lands," and noted that

> [a]lthough it is axiomatic that Congress may, by statute, extinguish treaty-secured hunting and fishing rights, it is equally clear that the courts do not lightly impute to Acts of Congress an intention to extinguish these rights.

Predatory Mammals and Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92nd Cong., 2d Sess. 144 (1972).

[8]There is no authority for the proposition that the legislative history of versions of legislation not enacted in an earlier Congress is properly a part of the legislative history of a bill which is enacted in a subsequent Congress. In fact, quite the contrary is the case. "In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 n.11 (1969); United States v. United Mine Workers, 330 U.S. 258, 281-82 (1947); Wisdom v. Norton, 507 F.2d 750, 757 (2nd Cir. 1974).

III.

CONGRESS HAD AMPLE OPPORTUNITY TO CLEARLY ABROGATE INDIAN TREATY RIGHTS BUT FAILED TO DO SO.

The Petitioner argues that the BEPA and the ESA must be read so as to limit Indian treaty rights. They argue that the religious exemption of the BEPA and the ESA Native Alaskan subsistence exemption are the *only* permissible exemptions. If Congress wanted such a reading to apply, it knew perfectly well how to accomplish such a result — it merely had to say so in the statutes or provide clear legislative intent to do so.[9] Despite opportunities in 1962 when it passed the BEPA amendment and in 1973 when the ESA was passed, Congress failed to do this.

The applicability of the BEPA to Indians was judicially raised in *United States v. White,* 508 F.2d 453 (8th Cir. 1974), and *United States v. Fryberg,* 622 F.2d 1010 (9th Cir.), *cert. denied* 449 U.S. 1004 (1980). Both occurred after the passage of the ESA.

In 1978, five years after passage of the ESA, and four years after *White, supra,* the American Indian Religious Freedom Act (AIRFA) was enacted. This statute provides unequivocal evidence that Congress did not intend through the ESA to abrogate Indian treaty rights to take endangered species for cultural and religious purposes. In

[9]See Mattz v. Arnett, 412 U.S. 481 (1973) at note 22 (Congress has used express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("the Smith River Reservation is hereby discontinued)); United States v. Celestine, 215 U.S. 278, 285 (1909) (. . . determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.").

AIRFA Congress expressly found that such a result was unintentional:

> Whereas the lack of clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;
>
> Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;
>
> *Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religious;*
>
> Whereas such laws at times *prohibit the use and possession of sacred objects* necessary to the exercise of religious rites and ceremonies . . .
>
> Resolved . . . henceforth shall it be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, *including but not limited to . . . use and possession of sacred objects.* (Emphasis added.)

92 Stat. 469.[10]

That Congress never intended the prohibitions of the ESA to apply to takings or possession and use of endangered species by Indians for religious purposes is bolstered by AIRFA's legislative history.

[10]The Supreme Court of Alaska has correctly observed that AIRFA's enactment "was largely motivated by laws such as those seeking to preserve endangered species." Frank v. State of Alaska, 604 P.2d 1068, 1073-74 n.9 (Alaska 1979).

Native Americans have an inherent right to the free exercise of their religion. That right is reaffirmed by the U.S. Constitution in the Bill of Rights, as well as by many State and tribal constitutions. The practice of traditional native Indian religions, outside the Judeo-Christian mainstream or in combination with it, is further upheld in the 1968 Indian Civil Rights Act.

Despite these laws, a lack of U.S. governmental policy has allowed infringement in the practice of native traditional religions. These infringements came about through the enforcement of policies and regulations based on laws which are basically sound and which the large majority of Indians strongly support. *These laws often embody principles such as the preservation of wilderness areas and the preservation of endangered species for which Indians have actively fought, literally generations before the non-Indian became convinced of their importance.*

But, because such laws were not intended to relate to religion and because there was a lack of awareness of their effect on religion, Congress neglected to fully consider the impact of such laws on the Indians' religious practices.

It is only within the last decade that it has become apparent that such laws, when combined with more restrictive regulations, insensitive enforcement procedures and administrative policy directives, in fact, have interfered severely with the culture and religion of American Indians. (Emphasis added.)

H.R. Report No. 95-1308, 95th Cong., 2d Sess. 1-2 (1978); cf. S. Report No. 95-709, 95th Cong., 2d Sess. 2 (1978).

Moreover, in Executive Branch hearings, mandated by AIRFA to gather testimony from Indian people nationwide, one of the most commonly voiced concerns dealt with the need for Indians to take, possess and use eagle feathers and other eagle parts for religious ceremonial purposes. *See* American Indian Religious Freedom Act Report, P.L. 95-341: Federal Agencies Task Force (August 1979) Appendix C.

Congress recently had an opportunity to clarify any conflict between the BEPA, ESA and AIRFA when it passed legislation reauthorizing the ESA. Hearings were held on June 11, 1985 specifically to consider whether or not the ESA should be amended so as to be made applicable to treaty tribes. *Hearings before the Subcomm. on Fisheries and Wildlife, Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries,* 99th Cong., 1st Sess. 311 (1985) (herein ESA Reauthorization Hearing). At this reauthorization hearing, representatives of various Indian organizations and tribes appeared. They pointed out that the proposed amendment would have a profound impact on their religious and cultural activity. *Id.* at 329.

The hearings brought out the fact that tribes are deeply concerned about the survival of the eagle precisely because their cultural and religious heritage is so dependent on the eagle. *Id.* Tribes such as the Navajo have, in fact, enacted laws designed to protect the bald and golden eagles as well as other endangered species found on their reservation. *Id.* at 434. The hearings also brought out the fact that the eagle population is on the increase.[11]

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[11]The following exchange took place:

Mr. Young: Going back to the monitoring now, this bird is put on the endangered species list by the Department.

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The hearings reveal the complex nature of the problem. As Congressman Breaux pointed out at the start of the hearings:

> It will not be easy to balance the conservation needs of the eagle and other endangered species with the requirements of the American Indians for the practice of their religion.

Id. at 312.[12]

Despite these hearings Congress did not act to definitely state that tribal rights to take eagles were prohibited under the reauthorized ESA. Congress was well aware that this case was pending before this Court but no attempt was made to clarify the situation by specifically abrogating treaty rights to take eagles. Abrogation of treaty rights is the task of Congress.

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> Have you any indications of the amount of birds available in the lower forty-eight? Is that on the increase or decrease, or where are we?
>
> Mr. Wallenstrom: Congressman, in 1985, we estimated that we had 1,745 breeding pairs, and in 1981 we had 1,420. *That represents an increase of about 81 breeding pairs per year.*

Id. at 323 (emphasis added).

[12]Petitioner and amici environmental groups maintain that the U.S. Fish and Wildlife eagle repository in Pocatello, Idaho sufficiently meets the religious and cultural needs of Indian people for eagle parts. Such is not the case. While the repository fills approximately 600 requests from Indians per year, *id.* at 320, there is a 1-1/2 year delay for filling orders for whole carcasses or tail fans. As of last summer USFWS had 600 pending applications for said parts. *Id.* at 321. Tribal and religious leaders expressed their concern for having to rely solely on the repository. *See*, e.g., *id.* at 414 (remarks of Hopi Chairman Ivan Sidney).

IV.

THE RIGHT TO TAKE EAGLES IS ESSENTIAL TO THE FREE EXERCISE OF TRADITIONAL INDIAN RELIGIOUS PRACTICES AND HAS NOT BEEN AFFECTED BY THE ACTS IN QUESTION.

The right of Indians to take, possess and use eagles and eagle parts or other species of flora and fauna is also protected by the First Amendment to the United States Constitution and Section 202(1) of the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1302(1). This right exists independent of such rights based in federal treaty, statute or Executive Order. Under traditional First Amendment law, such rights, if proven to be sincerely based in religious belief, can only be infringed where the government can establish a compelling need and where no less restrictive means to accomplish the same ends exist. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Northwest Indian Cemetery Protective Association v. Peterson*, 764 F.2d 581 (9th Cir. 1985); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied* — U.S. —, 104 S.Ct. 371 (1983).

To infringe upon such rights via the ESA, it would have been necessary for Congress to consider the compelling interest of the federal government, vis-a-vis the interests of Indian people.[13] But again, no such findings

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[13]As House Interior Committee Chairman Udall, AIRFA's principal sponsor in the U.S. House of Representatives, noted: "Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians. It is not the intent or the effect of my bill to permit Indians to cause the extinction of a species or destroy a wilderness area in the name of religion.

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were ever made under the ESA, nor did the government, given the facts of this case, establish that Indian religious uses represent a threat to the survival of either the bald or golden eagle. *See Dion, supra,* 752 F.2d at 1268 n.14, and discussion, *infra.* Statutory canons require a construction of the ESA which avoids an unconstitutional result; thus it must be read to not have affected Indian religious rights. Sutherland, *Statutory Construction,* Sec. 45.11 (4th ed. 1984); *United States v. Clark,* 445 U.S. 23 (1980).

V.

THE REGULATION OR SUSPENSION OF INDIAN TREATY RIGHTS TO TAKE EAGLES FOR RELIGIOUS AND CULTURAL PURPOSES IS NOT NECESSARY FOR THE CONSERVATION OF THE SPECIES.

As the previous discussion indicates, the legislative history of both the BEPA and the ESA do not support the Government's position that Congress intended to abrogate tribes' rights to hunt and fish on reservation. At most, any prohibition of rights can only extend to commercial takings, for such takings are not protected by the Yankton Sioux Treaty. *Dion, supra,* 752 F.2d at 1264. Indeed, as described above, the application of the federal endangered species laws to takings or possession of eagles for religious purposes was *unintentional,* oftentimes working an unconstitutional infringement on such rights.

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It is the intent of this bill to insure that the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration." Remarks of Chairman Udall concerning the intent of AIRFA. 124 Cong.Rec. H6872 (July 18, 1978).

These matters notwithstanding, if one assumes *arguendo* that the federal government possesses the authority by statute to "regulate" or "suspend" on-reservation hunting and fishing of endangered species, decisions of this Court and other lower federal courts support the principle that efforts must be made to protect species by first regulating non-Indian interests. Efforts by the federal government to regulate non-Indian industrial and commercial interests for the purpose of protecting endangered species and their habitat have been mediocre at best. In this regard, the attempt here to deprive Indians of such a fundamental right fails to meet the reasonable and necessary standards test first announced by this Court in *Puyallup Tribe v. Department of Game of Washington,* 391 U.S. 392 (1968) (*Puyallup I*).

A. Decisions of This Court Support the Principle That Indian Treaty Rights Can Only Be Regulated Where Necessary to Protect the Species From Extinction.

There are currently over 650 species of flora and fauna listed by the government as endangered or threatened species under the ESA.[14] Few people—Indian or non-Indian—question the validity of the federal government's goal of returning these species to a status where their very survival is not at stake. Indian people, as the Petitioner recognizes, are particularly interested in the protection of species which hold special religious or other traditional value. The eagle, in addition to being symbolic of national pride and patriotism, holds widespread religious significance among Indian people in the United States.

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[14]Yaffee, Steven, *Prohibitive Policy: Implementing The Endangered Species Act,* 63 (M.I.T. Press, Cambridge, MA 1982).

Solutions for removing the threat of extinction of eagles, however, are complex and involve many variables. Indeed, because of the fundamental importance of habitat to species such as the bald and golden eagle, any consideration of measures to protect the species necessarily includes measures to protect habitat.[15] And, because eagles are by nature migratory, different political entities with governing authority over different geographic areas will naturally be drawn into the effort to protect the species from extinction. Thus, today federal, state and tribal governments have legitimate roles to play in conserving the species. *See* Petitioner's Brief, p. 22.[16]

The situation with bald and golden eagles is not vastly different from that of various species of fish—salmon and steelhead trout, for example — in the Pacific Northwest. Decisions of this Court concerning the Pacific Northwest fishery have had broad social, economic, political and cultural implications for all residents of that region. Yet,

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[15]*See* United States Fish and Wildlife Service, *Northern States Bald Eagle Recovery Plan* (1983) at 5; United States Fish and Wildlife Service, *Management of Wintering Bald Eagles* (1978).

[16]" 'The sovereignty retained by tribes includes the power of regulating their internal and social relations,' United States v. Kagama, 118 U.S. 375, 381-382 (1886) . . . United States v. Wheeler, 435 U.S. 313, 322 (1978)." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983). Moreover, "vague or ambiguous federal statutes must be measured against the backdrop of tribal sovereignty, *especially when the statute affects an area in which the tribes have exercised their sovereign authority or contemporary federal policy encourages self-government*. Rice v. Rehner, 463 U.S. 713, 103 S.Ct. 3291, 3295, 77 L.Ed.2d 961 (1983)." (Emphasis added.) State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

despite tremendous political pressure, this Court and others have held unswervingly to the principle that Indian treaty rights have a paramount status in the law, in recognition of the rights and resources given up by tribes through the treaty process.

Thus, when the Supreme Court considered the validity of state regulation of Indian off-reservation fishing rights under the "in common with" language of the Stevens treaties, it held:

> But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulations meets appropriate standards and does not discriminate against the Indians. *Puyallup I, supra*, 391 U.S. at 398.

This standard has been extended to state efforts to regulate on-reservation treaty rights as well. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*).[17]

What the Court meant by "appropriate standards" was explained in a later decision: "[t]he 'appropriate standards' requirement means that the state must demonstrate that its regulation is a reasonable and necessary conservation measure . . . *and* that its application to the Indians is necessary in the interests of conservation." *Antoine v. Washington, supra*, 420 U.S. at 207 (emphasis in original).

The Court's reasoning in *Puyallup I* has been embraced by lower federal courts confronted with efforts by states

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[17]These two Puyallup decisions, together with Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) *(Puyallup II)*, are commonly referred to as the *Puyallup* trilogy.

to regulate Indian treaty fishing. For example, the federal district court for the State of Washington, in *United States v. State of Washington,* 384 F. Supp. 312 (W.D. Wash. 1974) (Judge Boldt), remarked that:

> If alternative means and methods of reasonable and necessary conservation regulation are available, the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish. *Id.* at 342.

And the Ninth Circuit, in upholding Judge Boldt's decision, affirmed the principle that states can regulate Indian fishing but must regulate the activities of non-Indians *first.*

> The state's program for management of the state's fisheries may appear sound and commendable, but the state shares its rights in those fisheries with another party. *It may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens.* The state may secure treaty Indians' compliance with these regulations only by gaining their acquiescence in its goals. Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary policy power jurisdiction. *Antoine v. Washington,* 420 U.S. 194, 95 S.Ct. 944, 952, 43 L.Ed.2d 129 (1975). (Emphasis added.)

United States v. State of Washington, 520 F.2d 676, 686 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976). And courts have assigned to the state the burden of proving by *clear and convincing evidence* that the regulation of

Indian treaty rights is necessary in the interest of conservation. *See, e.g., United States v. State of Michigan,* 653 F.2d 277, 279 (6th Cir.), *cert. denied,* 454 U.S. 1124 (1981).

While the relationship of the federal government to Indian tribes is different vis-a-vis the relationship between state governments and tribes, the same standard should nonetheless be adopted by this Court to determine whether and the extent to which general federal wildlife statutes operate to limit Indian treaty rights. In other words, because of the paramount status accorded Indian treaty rights, ambiguous federal wildlife statutes such as BEPA and ESA should only apply to regulate Indian on-reservation takings of endangered species for cultural and religious purposes as a matter of last resort *when necessary for the conservation of the species.* Moreover, the adoption of this standard is appropriate because the practical effect of general federal wildlife statutes is to put the federal government as resource manager in the same position as states as regulators of the exploitation of resources by competing Indian and non-Indian interests.

This approach is advantageous for several reasons. First, it accommodates competing yet legitimate Indian cultural and conservationist interests without destroying or emasculating either. "It is submitted that Indian treaty rights to hunt and fish are not fundamentally inconsistent with federal wildlife statutes, and that courts should seek a harmonization of the interests."[18] Second, given the need for regulation to prevent extinction it nonetheless recog-

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[18]See Coggins and Modrcin, *Native American Indians and Federal Wildlife Law,* 31 Stan. L. Rev. 375, 415 (1979).

nizes the importance of Indian treaty rights and the affirmative obligation of the United States as trustee of Indian property to protect those rights. *See Tulee v. Washington,* 315 U.S. 681, 684-85 (1942); *United States v. Mitchell,* 463 U.S. 206 (1983).[19]

Third, it allows Indian tribes to continue to exercise the inherent right of regulating the on-reservation activities of their members in the interest of conservation; thus fostering the government-to-government relationship embraced by President Reagan in his Indian policy statement. Endangered species are best protected by law and policy which strengthens tribal governments' ability to control their taking, rather than by a policy which eliminates that ability. *See* President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983); *New Mexico v. Mescalero Apache Tribe, supra.*[20] This approach has already been embraced by Congress as evidenced by a growing current of congressional support for the strengthening of tribal environmental controls.[21]

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[19]*See also* Peyote Way Church of God v. Smith, 556 F. Supp. 632, 639 (N.D. Tex. 1983) (federal government has a trust obligation, under AIRFA, to protect and preserve the cultural diversity of Indian people).

[20]Indeed, several tribes have adopted ordinances to restrict the on-reservation hunting, fishing and gathering of endangered plants and animals by tribal members. For instance, both the Navajo and Spokane Tribes have enacted ordinances prohibiting the taking, injuring, possession or use of bald eagles. *See* Navajo Tribal Code T17 sec. 505 and Spokane Code sec. 17-25.01. These ordinances, however, expressly allow the taking and possession of eagles or parts thereof for religious and/or ceremonial purposes provided permission is received from Tribal fish and game departments. *See* Navajo Code T17 sec. 508 and Spokane Code secs. 17-25.01-03.

[21]In recent legislation concerning the balancing of power resource needs with the protection of the Columbia River Basin fishery habitat, in the Pacific Northwest Electric Power Planning

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Finally, as a practical matter, such an approach recognizes the indispensability of this right from the perspective of Indian culture and religion, while recognizing that culturally motivated takings have a "minimal effect on species populations when contrasted to other pressures on wildlife populations."[22]

B. Better Efforts Must be Made by the Federal Government to Regulate Non-Indian Interests to Protect Bald and Golden Eagles before Indian Treaty and Religious Rights are Regulated.

Until better efforts are made to protect bald and golden eagles and their habitat from destruction by non-Indian related causes the federal government should not be allowed to regulate Indian treaty takings. Indeed, in this

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and Conservation Act of 1980, Pub. L. 96-501, 94 Stat. 2697, 16 U.S.C. Sections 839 *et seq.* In that Act, Congress (1) recognized the status of Indian tribes as regulators of their members' treaty fishing activities and as a partner in protecting the fishery resources of the region and (2) mandated that hydroelectric development and fisheries management be undertaken consistent with the treaty rights of Indian tribes of the region. *See e.g.,* 16 U.S.C. § 839(h). In addition, The Pacific Salmon Treaty recently concluded between the United States and Canada, and its implementing legislation, Pub. L. No. 99-5, 99 Stat. 7, recognize the treaty tribes of the Northwest as full partners in the Pacific fishery by allocating one of the United States' four seats on the administering commission to a tribal representative. The Environmental Protection Agency's recently issued Indian Policy Statement at 2-3 (November 8, 1984) requires the agency to deal with tribes on a government to government basis, and requests Congressional authorization for EPA to delegate to tribes the same regulatory authority it can currently delegate to states. *See also* pending amendments to Comprehensive Environmental Response Compensation and Liability Act (Superfund), H.R. 2817 and S. 51, 99th Cong., 1st Sess. (1985); Safe Drinking Water Act, H.R. 1650 and S. 124, 99th Cong., 1st Sess. (1985); Clean Water Act, H.R. 8 and S. 1128, 99th Cong., 1st Sess. (1985).

[22]Coggins, *supra* at 415.

case, the Eighth Circuit noted after examining the record that "the government has not established or even claimed that the eagle will become extinct if Indians are permitted to take eagles within the scope of their treaty rights." *Dion, supra,* 752 F.2d at 1268 n.14.

The National Wildlife Health Laboratory, at the direction of its parent agency the U.S. Fish and Wildlife Service, very recently examined data concerning bald eagle mortality gathered over a twenty year period. In a March 1985 report entitled "Bald Eagle Mortality from Lead Poisoning and Other Causes, 1963-1984," the Laboratory reported that over the study period, 77 percent of the bald eagle carcasses examined by the U.S. Fish and Wildlife Service and the Laboratory died from causes other than gunshot, including lead poisoning, pesticide and electrocution, and that these other causes over the time are claiming a greater percentage of eagles. The percentage killed by gunshot has declined; over the study period 23 percent were killed by gunshot, yet since 1975 only 17.6 percent have been killed by gunshot.[23]

Indeed, the USFWS noted in its 1983 *Northern States Bald Eagle Recovery Plan* (which includes South Dakota):

> *During the mid-20th century a new problem, environmental contamination, entered the picture and caused further significant declines in the remaining nesting populations.*
>
> Loss of habitat is perhaps the most serious negative factor, certainly the most difficult to hold and reverse. The destruction of wild areas through land development and increased human activity is affecting

[23]1983 USFWS *Northern States Bald Eagle Recovery Plan,* at 5.

> adversely the suitability of both breeding and wintering areas. *The cumulative aspect of habitat loss is the core of the problem.* (Emphasis added.)

Northern States Bald Eagle Recovery Plan, p. 5. The Plan also describes "far more insidious . . . losses" attributable to the direct and indirect effects of pesticides, herbicides and other chemical pollutants; and most recently heavy metal poisonings (lead, mercury) and acid rain.[24]

Yet despite the importance of breeding and wintering habitat to survival and propagation of bald and golden eagles, "critical habitat" — as provided in the ESA, 16 U.S.C. § 1533 — has not been designated for either species.[25] The designation of critical habitat permits the protection of geographical areas essential to the conservation of the species and the development of special management protections.[26] Ironically, of the over 650 species of flora and fauna on the endangered species list as of 1978 critical habitats had been designated for only thirty-three. Yaffee, *supra,* Appendix D, p. 173. Professor Steven Yaffee underscores the adverse effect politics plays upon efforts to protect endangered species:

> The designation of critical habitat moves the administrative process more clearly into the political arena because for the first time endangered species become spatial: The Mississippi sandhill crane is no longer a rare long-legged bird; it is now a potential limitation on federal agency actions — and private ones that need

[24]*See also,* Carson, Rachel, *Silent Spring* (Boston: Houghton Miffin, 1962); Detwyler, Thomas R. ed., *Man's Impact on the Environment* (New York: McGraw Hill, 1971).

[25]Green, Nancy, "The Bald Eagle," from *The Audubon Wildlife Report* 519 (The National Audubon Society, New York 1985).

[26]*See,* 16 U.S.C. § 1532(5) and §§ 1533(a)(3) and (b)(2).

federal permits—in thirty-nine square miles of southeastern Mississippi.

* * *

Politically responsive modifications of critical habitat can occur in more ways than those in the listing process. Delay can certainly occur. Allegations of strategic delay and footdragging in the designation of critical habitat have been prevalent since FWS first defined what critical habitat meant in April 1975.

Id. at 92.[27]

Not only does the Government in its brief badly distort the percentage of eagles killed by gunshot, and ignore the increasingly serious environmental and industrial causes of mortality, nowhere is there an effort to put the relative degree of Indian killing of eagles for religious and cultural purposes in perspective. This did occcur, however, in hearings held in June of 1985 before the House Subcommittee on Fisheries and Wildlife, Conservation and the Environment (of the Committee on Merchant Marine and Fisheries) on the subject of the Endangered Species Act and Native American religious practices. Mr. Clark Bavin, Chief of the Division of Law Enforcement, USFWS, in responding to a question from Chairman Breaux concerning former Interior Secretary Watt's statement in 1983 that 300 eagles were killed each year for their feathers, admitted that:

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[27]Yaffee recounts similar problems with the grizzly bear, which was placed on the endangered species list in 1975. Critical habitat was proposed in 1976, but has still not been designated. *Id.* at 92-3. For a shocking account of the political and bureaucratic morass relating to grizzly bear management *see* Chase, Alston, "The Grizzly and the Juggernault: How Enlightened Environmental Theory Has Destroyed the Great Bears of Yellowstone", Outside Magazine (January 1986), excerpted from *Playing God in Yellowstone: The Destruction of America's First National Park* (Atlantic Monthly Press, publication due March 1986).

So, based on those three sources, three independent types of cases, we estimated that approxixmately 300 eagles were killed each year, and *I specify for the feather trade, which is not for Indian religious purposes but for commercialization of eagle feathers.* (Emphasis added.)

Hearing Record, *supra* at p. 322.[28]

In sum, Indian takings of eagles for religious and cultural purposes—that protected by treaty and the First Amendment—represents but a small fraction of the annual takings nationwide. From the record in this case the government cannot demonstrate the necessity of regulating or suspending this right. Decisions of this Court in the *Puyallup* trilogy call for the regulation of non-Indian interests first to protect bald and golden eagles and their habitat. Only after best efforts are made to regulate these interests and the government can demonstrate by clear and convincing evidence that the species are still in danger of

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[28]Chief Bavin also noted that the illegal trade of eagle feathers does not usually involve Indians:

> Mr. Bavin. Congressman, we have monitored it to some extent. We have not broken another major undercover case since then. We have no indication that it has decreased.
>
> I might emphasize that since 1974, during the last 10 or 11 years, we have had five major undercover cases targeting the illegal trade. However, as we have put undercover agents back into the market, we find that it is continuing to flourish.
>
> Mr. Young. Now, you are talking about for feathers. Is this between the tribes, or is this some white guy out there killing birds and selling feathers to somebody else?
>
> Mr. Bavin. These cases are not focused on Indians. I should make that perfectly clear.

Hearing Record, *supra* at p. 322.

extinction can non-commercial Indian rights be regulated. *United States v. Michigan, supra.* Moreover, a compelling need to regulate as required by AIRFA and the First Amendment cannot be demonstrated. *Wisconsin v. Yoder, supra; Northwest Indian Cemetery Protection Association v. Peterson, supra; Wilson v. Block, supra.* At this point such a showing would indeed be difficult when, in fact, as discussed previously, numbers of nesting pairs of eagles have increased steadily over the past six years. In light of these circumstances any effort to regulate Indian treaty takings of eagles is clearly discriminatory. *Puyallup II, supra.*

—o—

CONCLUSION

For all the above reasons the decision of the Eighth Circuit should be upheld.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

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Petitioner,
v.
DWIGHT DION, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF AMICI

The Assiniboine and Sioux Tribes of the Fort Peck Reservation are federally recognized Indian tribes with a governing body recognized by the Secretary of the Interior. The Fort Peck Reservation is located in northeastern Montana.

The lands that are now the Fort Peck Reservation were first formally set aside as an Indian Reservation in 1873 by an Executive Order which created a large Reservation for the "Gros Ventre, Piegan, Blood, Blackfeet River Crow and other Indians." Executive Order of July 5,

1873, 1 Kapp, 855-6.[1] The "other Indians" then on that Reservation included the Assiniboine and Sioux. See, *United States v. Assiniboine Tribes*, 192 Ct. Cl. 679, 688-90 (1970). In 1874, Congress confirmed the Executive Order Reservation. Act of April 15, 1874, 18 Stat. 28.

In 1888, by Act of Congress, a portion of the larger 1874 reservation constituting the current Fort Peck Reservation was established as "the permanent home" of the Assiniboine and Sioux. Act of May 1, 1888, 25 Stat. 113, 114.

The Standing Rock Sioux Tribe is a federally recognized Indian tribe with a governing body recognized by the Secretary of the Interior, and a Reservation located in North and South Dakota.

The Standing Rock Reservation was part of the Great Sioux Reservation established by the 1868 Treaty with the Sioux Nation. 15 Stat. 635. That reservation was divided by the Act of March 2, 1889, 25 Stat. 888, into public lands and separate reservations as "permanent homes" for different portions of the Sioux Tribe. *Id.*, § 3, 25 Stat. 889.

The Assiniboine of Fort Peck and the Sioux of Fort Peck, and of Standing Rock consider the eagle sacred and require use of its feathers and other parts in religious ceremonies. The Fort Peck and Standing Rock Tribes are vitally interested in preserving their hunting rights, self-government and free exercise of their religions on the portion of their once great lands still reserved for them.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American

[1] Prior to this, Assiniboine hunting rights in a portion of what is now the Fort Peck Reservation were confirmed in Article 4 of the 1855 Treaty with the Blackfeet, 11 Stat. 657.

Indians. The Association is the largest Indian-interest organization in the United States and is nationwide in scope with a membership of 50,000 that includes both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before both federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *County of Oneida v. Oneida Indian Nation*, —— U.S. ——, 105 S.Ct. 1245 (1985); *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, —— U.S. ——, 105 S.Ct 2447 (1985); *Kerr-McGee Corporation v. Navajo Tribe of Indians*, —— U.S. ——, 105 S.Ct. 1900 (1985) and *Solem v. Bartlett*, —— U.S. ——, 104 S.Ct. 1161 (1984).

The brief is filed with the written consent of all parties, which have been lodged with the clerk.

SUMMARY OF ARGUMENT

The Court of Appeals for the Eighth Circuit for over ten years has correctly held that the Bald Eagle Protection Act ("BEPA") and later the Endangered Species Act ("ESA") must be interpreted to exempt Indian treaty protected use of eagles. There is no threat to either bald or golden eagles in preserving Indian religious use. Nor did Congress intend to interfere with such use.

This case concerns the reconciliation of these two conservation statutes with treaties, executive orders and acts of Congress establishing Indian reservations, with Indian hunting rights and the free exercise of Indian religion.

While Congress has the power to abrogate an Indian treaty, to do so is a significant breach of a promise made. This Court has been reluctant to find such an intent in the absence of an express declaration by Congress that it intends to abrogate a treaty provision. Where Indian rights are created by statute the Court similarly requires

a "clear and plain" abrogation in a later statute to support a Congressional intent to repeal the earlier right.

Where hunting and fishing rights are at stake the express abrogation rule is applied most strictly. The essence of self-government over the small amount of land left to the Indian tribes is their right to control their own hunting and fishing. This is at the core of Indian life and culture. This Court has upheld Indian hunting rights even where reservations have been abolished and has protected such rights from regulation by the states in the name of conservation.

Neither the BEPA nor the ESA evidence a clear Congressional intent to limit Indian treaty or reservation rights. BEPA was enacted in 1940 without any statutory or legislative history reference to Indians and enforced for 22 years without application to Indians. The 1962 amendments were concerned with confusion between bald eagles and golden eagles and did not have as a purpose any limitation on Indian rights. The Court should decline to interpret BEPA's 1962 amendments as a backhanded way of abrogating Indian rights.

Similarly, the provisions of ESA exempting Alaskan subsistence hunting from the Act do not show an intent to subject reservation Indians to ESA in their treaty and religious non-commercial use of animals and plants. ESA was adopted just two years after the Alaska Native Claims Settlement Act abolished all Alaskan native aboriginal rights to land and aboriginal hunting rights. There was only one Indian reservation in Alaska and it was exempted from ANCSA. If nothing were written into ESA protecting Alaska natives, they would have been without any protection, but normal rules of construction would protect non-commercial treaty hunting by reservation Indians.

The only treatment of Indians in BEPA or ESA was to facilitate Indians' use of eagles in addition to that provided by existing law and treaties. These supplemental

protections were not intended and should not be construed to abrogate rights under existing law.

If applied to Indian use of eagles in religious ceremonies, BEPA and ESA violate the free exercise of religion clause of the first amendment. The eagle, and eagle feathers are among the most sacred symbols in Indian religion. Requiring a permit from the Secretary of the Interior to receive them, and then acquiring them, after months or years of wait, frozen in plastic bags from the Department's central depository, is a degrading and unnecessary limitation on the free exercise of Indian religion. This Court has struck down far less intrusive limitations on religion. No secular need requires these limitations.

ARGUMENT

This case involves a reconciliation of the treaty, hunting and religious rights of Indians, and two conservation statutes, the Bald Eagle Protection Act, 16 U.S.C. §§ 668-668d (1982), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982). The Court of Appeals for the Eighth Circuit has dealt with this problem twice, once over ten years ago in *United States v. White*, 508 F.2d 453 (8th Cir. 1974), and more recently in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985). The jurisprudence in the Eighth Circuit has established that Indians are subject to the prohibitions of the Eagle Protection Act and Endangered Species Act except where the Acts would infringe on treaty-protected rights. The Eighth Circuit has defined treaty-protected rights as *not* extending to any commercial transaction in protected species. The Ninth Circuit, on the other hand, has made an across-the-board interpretation that the Bald Eagle Protection Act applies fully to Indians regardless of treaty rights, self-government or religion. It has not ruled on the Endangered Species Act.

This issue is of minor importance to the enforcement of either act in that the rights at issue are limited geographically to areas set aside for the use or occupancy of Indian tribes by treaty, statute or Executive Order. Moreover, with *all* commercial taking of species protected by either of the Acts prohibited, there is no threat to the continuing existence of either the Golden Eagle or the Bald Eagle from the occasional ceremonial or religious use by Indians.[2] But the importance of the case to Indian tribes is enormous because it affects three propositions at the core of their Indian culture and society: (1) the United States' respect for the treaties or acts of Congress establishing their reservations; (2) their self-government in the quintessential Indian right of hunting on their own reservations; and (3) the free exercise of their religions.

I. A TREATY RIGHT WILL NOT BE HELD ABROGATED BY AN ACT OF CONGRESS UNLESS THE INTENT OF CONGRESS TO ABROGATE IT IS CLEAR AND PLAIN.

When treaties were made with Indian tribes they were not gifts to the Indians. In the usual circumstance, the treaty ceded to the United States enormous quantities of land for insignificant consideration in goods but the very significant promise that the area reserved by the Tribe would be its exclusive homeland forever. Rights not given up were reserved. *Winters v. United States,* 207 U.S. 564, 576-77 (1908); *United States v. Winans,* 198 U.S. 371, 381 (1905). The United States never stated to the Indians that the treaty was its solemn word only until Congress decided to pass a statute to the contrary. It was clearly the understanding of the Indians—and probably

[2] Indeed, the Golden Eagle, the most important to the Indians, is not and has never been on the endangered species list, and the Bald Eagle, with the banning of DDT, is steadily increasing in numbers.

the understanding of the federal negotiators—that the treaty was not to be broken by either side.[3]

Where an act of Congress permits a reading avoiding abrogation of Indian treaties, this Court long has required such a reading. In *Leavenworth, Lawrence & Galveston Railroad Company v. United States,* 92 U.S. 733 (1876), where the question was whether a statutory grant to a railroad included treaty lands of the Osage Tribe, the Court held that it did not:

> [S]uch grants could be treated in no other way for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose unless there be *an express declaration to that effect.* . . . As the attempted transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.

Id. at 741-42 (emphasis added). *Accord, Frost v. Wenie,* 157 U.S. 46 (1895).

It is not surprising, therefore, that when this Court first had before it an act of Congress specifically setting aside provisions of a treaty made with the Indians, the Court was deeply troubled. In *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), the Court squarely held that Congress has the power to abrogate an Indian treaty. It based this power on Congress' role as guardian of the Indians. But the tension between Congress as guardian of Indians and Congress deliberately violating a treaty with the Indians was apparent. In *Lone Wolf* the statute was a direct abrogation of the specific treaty, and was unequivocal. There was no room for interpretation. In

[3] *See* F. Cohen, *Handbook of Federal Indian Law,* 222-23 (1982 Ed.); Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That,* 63 Cal. Law Rev. 601 (1975).

acknowledging the *power* to "abrogate the provisions of an Indian treaty" the Court also stated that "presumably such power will be exercised only when circumstances . . . demand [it]." *Id.* at 566. Even with its limitation on the use of the power of abrogation, *Lone Wolf* has gone down in Indian history as a decision equal to the Dred Scott decision.[4]

In recognition of the unseemliness of a powerful trustee cavalierly abrogating agreements made with dependent beneficiaries, the Court soon developed certain procedural limitations on Congress' exercise of the power of abrogation. Thus, in *United States v. Payne*, 264 U.S. 446, 448 (1924), the Court observed that, where a statute might be construed to contradict the terms of an earlier treaty, the statute

> should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and pro tanto, abrogate, the treaty, is not to be lightly attributed to Congress.

The *Payne* rule was reaffirmed in *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (intent to abrogate would not be "lightly imputed to Congress"), and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .").[5]

---

[4] *Sioux Nation of Indians v. United States*, 220 Ct. Cl. 442, 470 (1979) (Nichols, concurring). This Court has subsequently held that Congress' power over Indians is not absolute. The "legislative judgment" must be "tied rationally to the fulfillment of Congress' unique obligation towards the Indians." *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

[5] Similarly, *Payne* was cited by the Court in *Cook v. United States*, 288 U.S. 102, 120 (1933) as support for the proposition that "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

This justifiable reluctance to hold that an act of Congress violates Indian treaty rights carries over to Indian rights created by statute as well. The leading cases hold that a "clear and plain" showing of legislative intent must be made to support a claim that Congressional action has repealed statutory Indian rights. In *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339 (1941), for example, the Court held that the Walapai Tribe's title to land claimed by the Santa Fe Railroad was never extinguished although it had been provided with a different reservation. The implication could have easily been drawn that the former Indian land had been released. The Court, however, held that there was no "clear and plain" congressional intent to extinguish the Tribe's right. *Id.* at 353.

In *Choate v. Trapp*, 224 U.S. 665 (1912), a state tried to tax a statutorily-created Indian allotment, relying on language in an act of Congress that removed the prohibition against sale of the property. The Court held that, contrary to the ordinary principles for tax cases, "doubtful expressions" in the statute must be "resolved in favor of" the Indians. 224 U.S. at 675-76. Then, in *Squire v. Capoeman*, 351 U.S. 1 (1956), the Court had to reconcile the capital gains provisions of the Internal Revenue Code, which by their terms applied to everyone, with provisions of the earlier General Allotment Act which required property to be returned to Indians free of liens at the end of the allotment period. The United States urged the Court to uphold the across-the-board application of the tax law. The inability to impose a lien on specific property, the United States argued, did not imply the inapplicability of the tax law. But this Court held for the allottee saying

> We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. . . . But we cannot agree that taxability of

> respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

351 U.S. at 6.

The rules of law applied in these cases were developed *before* Congress enacted either the Eagle Protection Act or the Endangered Species Act. The Court, therefore, should presume that if Congress wished to terminate Indian treaty rights or rights created by the statute or executive orders establishing their reservations, it would have discussed this in debate and would have acted specifically to do so.

II. THE EXPRESS ABROGATION RULE IS APPLIED MOST STRICTLY WHERE INDIAN HUNTING AND FISHING RIGHTS ARE AT ISSUE.

Hunting and fishing are among the quintessential Indian rights. From treaty times up to the present they have provided a chief means of subsistence and of continuation of an Indian way of life. The right to hunt and fish, therefore, is implied by any reservation of land for Indians whether by treaty, statute or executive order. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); F. Cohen, *Handbook of Federal Indian Law*, 449-450 (1982 Ed.). The Court has held further that, in a statute abolishing an Indian reservation and subjecting the Indians to the laws of the state, Indian hunting rights free of state supervision endured. *Menominee Tribe v. United States*, 391 U.S. at 410-11.[6] *Accord*, *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974); *cf. Antoine v. Washington*, 420 U.S. 194 (1975).[7]

[6] In *Menominee*, when damages for a Fifth Amendment taking of hunting rights were at stake, the United States, contrary to its position here, argued that the treaty hunting rights were not modified by a statute that expressly terminated the reservation. The Court agreed.

In 1942 Solicitor Nathan Margold of the Department of the Interior (during a year when Felix Cohen was Assistant Solicitor) wrote an opinion on whether a Yakima Indian could be prosecuted for killing a migratory bird on the Yakima Indian Reservation under the regulations enforcing the migratory bird treaty with Great Britain. 1 *Opinions of the Solicitor, Indian Affairs* 1090. This was only two years after passage of the Bald Eagle Protection Act. To prohibit the Yakimas' hunting, Solicitor Margold stated, would violate the treaty with the Yakimas. Solicitor Margold stated:

> While it is established that Congress has the right to violate treaty obligations, the converse of this rule is that an intent to do so will be found only where the language of the legislation leaves no room for any other possible construction.
>
> "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

Id. at 1090, *quoting Cook v. United States*, 288 U.S. 102, 120 (1933).

Solicitor Margold held that, even though the migratory bird treaty provided some specific exceptions for Indians, these applied to all Indians and there was no reason to hold that Congress in addition intended the treaty to limit rights guaranteed by specific treaties with the Indians. He stated that if the treaty with Great Britain necessarily requires a limitation on Indian hunting rights,

[7] Moreover, in the case of hunting and fishing rights created by treaty, the Court has enforced even off-reservation rights. *E.g.*, *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

that should be determined and then should first be negotiated with the Indians to see if a voluntary resolution of the conflicting obligations could be created. In the absence of such a voluntary solution, the Solicitor concluded, Congress should state in new legislation which of the two conflicting treaty obligations should be violated and which should be enforced.[8]

In 1941, less than a year after passage of the Bald Eagle Protection Act, the United States District Court for Idaho in *United States v. Cutler*, 37 F. Supp. 724 (D. Idaho, 1941), had arrived at the same conclusion as Solicitor Margold regarding the Migratory Bird Act. That court stated

> [W]hen in considering treaties with Indians and Acts of Congress relating to their rights, we should not forget the well known liberal application of the principle, that grants by them should be regarded "strictissimi juris" and all uncertainties resolved in their favor.

37 F.Supp. at 725.

This opinion and case and Solicitor Margold's reference to the 1933 opinion of this Court in *Cook v. United States*, are all of extreme importance in interpreting the Bald Eagle Protection Act and Endangered Species Act because they show the law at the time that Congress acted and the understandings that Congress would have had of the specificity needed if it intended to restrict Indian treaty or hunting rights. Also significant is the fact that the Eagle Protection Act was enacted in 1940 during the Roosevelt Administration shortly after the 1934 enactment of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, strongly reaffirming Indian rights.

The United States, citing the *Puyallup* cases states that tribes do not have treaty rights to hunt a species to ex-

[8] The Department has changed its mind many times on these issues and currently, apparently, holds a contrary view.

tinction (Br., 17). From this, they argue (Br. at 17-23) that prosecutions under BEPA and ESA do not violate treaties. This is a plea to emotion, not law or reason. No tribe has a reservation that sufficiently controls an eagle species to permit it to hunt the species to anywhere near extinction. No tribe desires to do so and none ever has done so. The golden eagle is not even an endangered species and certainly there is no threat to eagles being hunted to extinction by Indians under the limits set by the Eighth Circuit.[9]

The United States also incorrectly states (Br. 18, n.21) that Congress found both the golden and bald eagles to be "so threatened with extinction that all takings must be avoided, subject only to certain very narrow exceptions." Congress has never found the golden eagle to be threatened at all. It is not listed as an endangered species under ESA and was only included in BEPA because of possible confusion with immature bald eagles to ease the burden on the prosecutor. *See* discussion at pages 15 to 16, *infra*. Nor has any showing been made that Indian religious takings of bald eagles endangers the species.

A statute's conservation motivation does not of itself subordinate an Indian treaty to it. The *Puyallup* cases and *Washington* case relied upon by the United States (Br. at 19-22) are all cases *upholding* treaty fishing against attempted regulation by the State of Washington on the basis of conservation. In each, as here, there was no showing before the court that the Indian activity would threaten the existence of the species and that the species could not be protected by reducing taking by others. The decision in *New York ex rel. Kennedy v.*

[9] The United States' phrase is from *Washington Game Department v. Puyallup Tribe*, 414 U.S. 44 (1973), and was used in *striking down* an attempt to limit Indian treaty fishing. There as here there was no showing that preservation of the Indian treaty rights would lead to any such result.

Becker, 241 U.S. 556 (1916), also cited by the United States, concerned only off-reservation fishing, and the court specifically said, "It should be added that we have not considered any question relating to conduct or fishing rights upon territory, not ceded, which is comprised within the Indian reservation." *Id.* at 564. Moreover, the case seems to have been overruled or, at least, significantly limited by the *Puyallup* and *Washington* cases which also concerned off-reservation "in common with" fishing rights, but struck down limits on Indian fishing.

III. BEPA AND ESA DO NOT EVIDENCE A CLEAR CONGRESSIONAL INTENT TO LIMIT INDIAN TREATY OR RESERVATION RIGHTS.

A. The 1940 Bald Eagle Protection Act.

The Bald Eagle Protection Act, 16 U.S.C. §§ 668-668d (1982), was enacted in 1940. It applied only to bald eagles. There was no reference to Indians, Indian tribes, Indian treaties or Indian religion in the Act as passed. Nor does the legislative history of the 1940 act have any such reference. It was not amended until 22 years later. We know of no instance of its application to Indians in that entire 22 years and, certainly, the United States does not assert any. The 1940 Act, therefore, does not clearly and plainly limit Indian treaty or reservation rights.

B. The 1962 Amendments to the Bald Eagle Protection Act.

The 1962 amendment, P.L. 87-884, 76 Stat. 1246, added golden eagles to the Act, increased the penalties and provided that the Secretary of the Interior may make exceptions, *inter alia*, for Indian religious use and, with regard to golden eagles, for the protection of flocks and herds. The purposes of the proposed amendments were to decrease the *scienter* requirements of the criminal statute by extending the Act to golden eagles as well as bald eagles and to increase the penalties.

The amendment was adopted after extensive hearings, the focus of which was not Indians or Indian tribes, but bounty hunters in Texas, and protecting sheep and goat ranchers. A newspaper article quoting a bounty hunter stating that he had killed as many as 12,000 eagles by air, for pay by Texas ranchers, was much discussed. *Miscellaneous Fish and Wildlife Legislation, 1962: Hearings on H.J. Res. 487 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 12-16 (1962) (hereinafter cited as "1962 House Hearings").[10] Golden eagles were not and are not an endangered species. They were included solely because immature bald eagles can be mistaken for golden eagles. Prosecutions were made more difficult because a hunter could sometimes claim he thought he was lawfully killing a golden eagle.

No Indians or Indian tribes testified at the hearings or, so far as we can determine, were informed of the hearings. There was no testimony before Congress that Indian killing or use of eagles in any way contributed to an endangerment of either eagle species. Nor was there any mention of a necessity or even desirability of impairing Indian treaty or religious rights.

References to Indians occur in only two places: the Secretary of the Interior's comments on the bill, and the testimony of the Audubon Society. The Secretary, neither supporting nor opposing the bill, made two important comments:

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[10] In the Senate hearing on the 1962 amendment, there was also debate between members of the Texas congressional delegation over the danger of golden eagles as predators on the young of sheep and goats. Sen. Yarborough of Texas, spoke in favor of the bill. *Protection for the Golden Eagle: Hearings on S.J. Res. 105 Before a Subcommittee of the Senate Committee on Commerce*, 87th Cong., 2d Sess., *passim* (1962) (hereafter cited as "1962 Senate Hearings"). Texas sheep ranchers and Representative Fisher testified against including golden eagles. *Id.* at 13-22, 75-78, 79-85.

Although golden eagles apprently have declined in number in recent years *in the Eastern States,* we cannot state . . . that the golden eagle has reached the stage of an endangered species. Golden eagle abundance varies widely between regions.

* * * *

Among the many birds held in superstitious and appreciative regard by the aborigines of North America, the eagle by reason of its majestic, solitary and mysterious nature became an especial object of worship. This is expressed in the employment of the eagle by the Indian for religious and esthetic purposes only. . . .

There are frequent reports of the continued veneration of eagles and of use of eagle feathers in religious ceremonies of tribal rites.[11]

The Secretary suggested the permit language concerning Indians ultimately enacted. Given that his concerns were centered around the free exercise of Indian religion and his refusal to deem the golden eagle an endangered species, however, one may not conclude reasonably that his suggested permit language was an effort to abrogate Indian treaty rights. Indeed, the Secretary's motives quite clearly were to protect Indian use of eagles.

Carl Buckheister, President of the Audubon Society, testified in favor of the bill at the House hearings. 1962 *House Hearings* at 28-30. He argued against the Texas view that golden eagles are harmful predators. He also spoke against the souvenir, and *pseudo*-Indian *commercial market* in eagle feathers saying:

> Moreover, the intentional slaughter of golden eagles and the accidental killing of bald eagles is encouraged today by a growing, commercial trade in eagle feathers. The wings and feathers are retailed by mail order throughout the Nation and in over-the-counter trade, particularly in the Southwest, *to craft hobbyists and souvenir hunters. Many of them go into pseudo-Indian headdresses which are sold to the tourist trade.*
>
> Mr. Chairman, unless this commercial traffic is halted it can spell the doom of the golden eagle, just as the millinery trade almost wiped out the plume birds a half century ago.

Id. at 29 (emphasis added). The Audubon Society remarks are addressed to commercial traffic and souvenir hunters, not any threat imposed by genuine Indian non-commercial treaty or religious uses.[12] *See also 1962 Senate Hearings* at 39-41.

The House Report refers to the Texas bounty hunters and says, somewhat inaccurately, that there was no testimony that any agricultural livestock are harmed by the golden eagle. It also summarizes the Audubon Society testimony inaccurately by referring over broadly to a market to provide feathers for Indians and as souvenirs. The Report recommends enactment of the Secretary of the Interior's proposed amendments. There is no discussion of limiting Indian treaty, reservation, or religious rights. H.R. Rep. No. 1450, 87th Cong., 2d Sess. (1962).

The Senate Report stated that "[e]vidence presented at the subcommittee hearing, while convincing in the need for additional protection of the golden eagle, also indicated a serious problem of predation by these eagles exists in some parts of the country." S. Rep. No. 1986, 87th Cong., 2d Sess. 2 (1962). It referred to the testimony from Texas ranchers and recommended permits for area wide takings rather than individual permits. There was no mention of Indians at all except adoption of the

[11] Letter from Assistant Secretary Briggs to Hon. Herbert Bonner, Chairman of the Merchant Marine and Fisheries Committee of the House, *reprinted in 1962 House Hearings* at 2-4 (emphasis added). *See also, 1962 Senate Hearings* at 4-6; H.R. Rep. No. 1450, 87th Cong., 2d Sess. 3-6 (1962); S. Rep. No. 1986, 87th Cong., 2d Sess. 5-7 (1962).

[12] *See also* testimony of Dr. Walter Spotford, zoologist, *id.* at 34-35, to the same effect.

Secretary's suggestion that he be authorized to give permits for Indian religious use of eagles. *Id.*

In the floor debate in both the Senate and House, the issue was the effect of the amendment on sheep and goat ranchers. No issues of Indians, Indian treaties, or Indian religion were discussed. 86 Cong. Rec. 6446-7, 7006-7 (1962).

This is far from the express declaration of an intention to overturn an Indian treaty or statutory right required by *Leavenworth* or *Lone Wolf*. Nor is there any expressed purpose of exercising the United States' trust responsibility towards Indians by deliberately abrogating their guaranteed rights. Congress was not concerned with a threat to either species by Indians but by Texas ranchers and commercial tourist trade. The Secretary of the Interior was seeking to facilitate Indian usage of eagles, not limit it. The Court should "decline to construe [the Act] as a backhanded way of abrogating the hunting . . . rights" guaranteed by the Sioux Treaty of 1868. *Cf., Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968).

C. The Endangered Species Act of 1973.

The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982), is relevant only to the bald eagle as the golden eagle is not listed as an endangered species. It prohibits taking or possessing species of plants or animals listed as endangered by the Secretary of the Interior. The Act provides an exception for:

> (A) any Indian, Aleut or Eskimo, who is an Alaskan Native who resides in Alaska; or
>
> (B) any non-native permanent resident of an Alaskan native village;
>
> if such taking is primarily for subsistence purposes.

16 U.S.C. § 1539(e) (1982). It makes no reference to Indians of the lower 48 states nor to Indian treaties or reservations.

There were numerous proposed endangered species bills in the 92nd and 93rd Congress.[13] But the ESA grew out of two bills before the 93rd Congress (1973): S. 1592, the Magnuson bill, and S. 1983, the Williams bill. Neither bill had any reference to native people. The Magnuson bill was limited to *fauna*. The Williams bill extended the scope of coverage to *flora* as well as *fauna*.

The hearings largely concerned state versus federal power, the extent of the bills' coverage of flora as well as fauna, and international trade in endangered species. There was no discussion of the treaty, reservation self-government or religious rights of Indians. Nor was there any discussion of Indians in the lower 48 states at all. *See, Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcommittee on Environment of the Senate Committee on Commerce*, 93rd Cong., 1st Sess. (1973); *Endangered Species Act of 1973: Hearings on H.R. 37 et al. Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 93rd Cong., 1st Sess. (1973) (hereafter cited as "1973 Senate Hearings"). Senator Stevens of Alaska and representatives of native groups of Alaska successfully supported an exception for subsistence use by natives living in Alaska Villages. *1973 Senate Hearings* at 126-129, 149, 151. Only two years before, Congress had enacted the Alaska Native Claims Settlement Act of 1971, P.L. 92-203, 85 Stat. 688 (1971), 43 U.S.C. §§ 1601-1628 (1982), extinguishing aboriginal title, including "aboriginal hunting and fishing rights," 43 U.S.C. § 1608(b), and establishing native corporations, 43 U.S.C. §§ 1606, 1607. Without special protection in the Endangered Species Act it was clear that most Alaskan Natives would be without any protection at all for their

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[13] During the 92nd Congress, *see e.g.*, S. 249, S. 3199, S. 3818, H.R. 12186, H.R. 13081. During the 93rd Congress, *see e.g.*, S. 1592, S. 1983, H.R. 37, H.R. 4758.

hunting rights. That is not so, of course, for Indian tribes elsewhere since they—unlike Alaska Natives—have treaties, statutes and executive orders that protect their hunting rights, either expressly or by necessary implication.[14]

The Senate bill in the end contained Alaska exceptions and the House bill did not. The conference rewrote the exception to apply both to native and non-native Alaskans with specific reference to the definition of native in "the recent Alaska Native Land Settlement Act." H.R. Rep. No. 740, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 3001, 3006. Here too, the intent to limit treaty rights or to invade self-government by Indian tribes with reservations is completely lacking. In short, the legislative history is barren of any affirmative indication of congressional intent to abrogate tribal hunting rights. Because this Court will not lightly impute such an intent, the Act may not fairly be read to abrogate those rights.

The United States would have the Court infer that because of the Alaska exception Indians in the lower forty-eight states are wholly subject to the Act regardless of treaty or reservation rights. The record provides no reason to believe that Congress intended to be less solicitous of Indian treaty rights than Alaska Native subsistence. Indeed, the more reasonable inference is that Congress believed lower forty-eight tribes to be protected by treaties, statutes and executive orders. As with the 1962 Amendments to BEPA, the most sensible construction of this protection for Alaska Natives is that it

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[14] From the time Alaska was acquired by Russia in 1867 to Alaskan statehood in 1959, the federal government largely ignored Alaska Natives. No treaties were made with any Alaska Native group. F. Cohen, *Handbook of Federal Indian Law* 739 (1982 Ed.). The only statutory reservation in Alaska (Metlakatla) was specifically excluded from the coverage of the 1971 settlement act. 43 U.S.C. § 1618(a).

supplements and does not derogate from treaty rights established by existing law. Alaska's Senator and Alaska Natives were seeking protections in addition to existing law, not its abrogation.

IV. THE EAGLE PROTECTION ACT AND THE ENDANGERED SPECIES ACT VIOLATE THE FREE EXERCISE OF RELIGION CLAUSE OF THE FIRST AMENDMENT IF HELD APPLICABLE TO USES OF EAGLES BY INDIANS FOR RELIGIOUS PURPOSES.

While keeping faith with the Indian tribes as to treaties and hunting rights is essential in the relationship between the United States and Indian tribes, and has been protected by this Court, the free exercise by Indians of their religions has an even greater protection. It is part of the free exercise of religion guaranteed by the Constitution to all people in the United States. Here the question is not only the intent of Congress, but the *power* of Congress as limited by the First Amendment.

The occasional hunting of eagles for religious use and the use of eagle feathers, plumes and other symbolic parts are central to the religious beliefs of most American Indian tribes including the Yankton Sioux of which respondent Dion was a member and the Assiniboine and Sioux Tribes of the Fort Peck Reservation and the Sioux Tribe of the Standing Rock Reservation, *amici*. These beliefs are not only historic but are of great importance today. Indeed, a revival of Indian religion and ceremonies has been an important part of the increased pride and progress of American Indian tribes in recent years.

One of the authoritative statements of Sioux ritual and belief is found in *The Sacred Pipe, Black Elk's Account of the Seven Rites of the Oglala Sioux* recorded and edited by Joseph Epes Brown, University of Oklahoma Press, 1953. In it, Black Elk explains the role of

Wakan Tanka as father and grandfather and spirit of the universe. He explains (as recorded and edited by Brown):

> Since *Wanbli Galeshka* (the Spotted Eagle) flies the highest of all created creatures and sees everything, he is regarded as *Wakan-Tanka* under certain aspects. He is a solar bird, His feathers being regarded as rays of the sun, and when one is carried or worn by the Indian it represents, or rather *is*, the "Real Presence," the wearer actually becomes the eagle, which is to say that he identifies himself, his real Self, with *Wakan-Tanka*.

Brown continued by commenting:

> From this it should be clear what is really being expressed in the often misunderstood Ghost Dance song: "Wambli galeshka wana ni he o who e," "The Spotted Eagle is coming to carry me away."

Id., at 6, n.9.

Of the seven sacred rituals explained, six—all but preparing a girl for womanhood—require the use of eagle feathers as a representation of the holy spirit. One of the most sacred of all, the sun dance, also requires the use of a whistle made from the wing bones of the spotted, or golden eagle.

The eagle plays a similar role in Assiniboine religion, which is also actively practiced on the Fort Peck Reservation. There are prescribed rituals before any eagle feathers, plumes, bones, or other parts can be used. Eagle wing bones, feathers and plumes are used in the Medicine Lodge ceremonies of the Assiniboine, their most important ritual. Eagle feathers are also used in naming ceremonies, death ceremonies, or honor ceremonies and in the Sweat Lodge, which is the purification rite which is the cornerstone and starting point of the other principal ceremonies. Once the feathers are made into sacred objects, they are used a lifetime or longer.

Eagle feathers and the eagle whistle have an almost identical role in Indian religion to the eucharist or communion wine and wafer in Christian religion, and have a considerably more central role than the use of wine or unleavened bread in Jewish ceremonies.

A federal regulation on the obtaining or use of eagle feathers or of the eagle whistle is thus exactly equivalent to a federal regulation on the obtaining or use of communion wafers and wine. The Eagle Protection Act provides that an Indian can only obtain eagle feathers or an eagle if he has previously obtained a permit from the Secretary of the Interior. The Secretary so far as we know has never issued permits for Indians to take eagles themselves. Permits are issued to obtain frozen eagles from a central depository in Pocatello, Idaho. The permits take a year to a year-and-a-half to be filled. The eagles are primarily killed by white ranchers who, contrary to the case with Indians, are given permits to kill eagles to protect sheep or cattle. The eagles arrive, if at all, decomposing in plastic bags.

The entire scheme is a degradation difficult to exaggerate. If an eagle is the symbol of divinity because of its high flight and freedom, a frozen eagle from a federal depository, killed by a non-Indian and received after filling out federal forms and at the pleasure of the Department of the Interior, has certainly lost much of its power.

In judging an act of a legislative body that infringes on the free exercise of religion, this Court has held that if there is a secular purpose that justifies the restriction then the restriction must be done in the least drastic means to accomplish the secular end. This ordinarily prohibits requirements of prior licenses from secular authority. In *Schneider v. Irvington*, 308 U.S. 147 (1939), a court reversed a conviction of a Jehovah's Witness for distributing religious circulars and soliciting contributions without first obtaining a police permit as required by a municipal ordinance. The court recognized that the

Town's permit requirements served a secular purpose by preventing "fraudulent appeals . . . in the name of charity and religion," *id.* at 164, but held that less restrictive means were available by not requiring permits in advance but prosecuting fraudulent solicitations. The court stated that if "these means are less efficient and convenient than bestowal of power on police authorities . . ., the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Id.*

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court similarly reversed convictions of Jehovah's Witnesses for soliciting religious contributions without a state permit. The Court held that the "free exercise . . . of religion" is one of the fundamental concepts of liberty embodied in the Fourteenth Amendment, *id.* at 303, and that to condition religious solicitation "upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden on the exercise of liberty protected by the Constitution." *Id.* at 307. The Court did not suggest that findings by the state legislature or Congress could replace its own investigation into whether there were less drastic means to achieve the necessary public purpose without infringing on constitutionally protected exercise of religion. *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943); L. Tribe, *American Constitutional Law*, 846-859 (1978).

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the South Carolina courts had upheld the provisions of the South Carolina Unemployment Compensation Act denying benefits to a worker who had lost her job because her religious scruples forbade her to work on Saturday. South Carolina attempted to justify its position on the need to prevent fraudulent depletion of the fund through spurious claims of religious belief. The Court, speaking through Mr. Justice Brennan, reversed, stating:

> For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

Id. at 407. The Court stated further:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area "[o]nly the gravest abuses endangering paramount interests, give occasion for permissible limitation."

Id. at 406, *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945).

As we have shown, the golden eagle is not now and has never been on the endangered species list and was included in the BEPA only because it is difficult to tell an immature bald eagle from a golden eagle. Nor is there reason to believe that Indian religious takings of eagles have threatened either species. Moreover, BEPA permits ranchers to continue to kill golden eagles with the consent of the Secretary of the Interior to protect their flocks. Thus the findings of the Act fall far short of the kind of necessity that would justify an infringement of religious practices. These findings no more justify this infringement than a statement in a state act to the effect that it is necessary to require Jehovah's Witnesses to get permits to solicit funds to protect the public from abuse would isolate that statute from Constitutional attack. Moreover, the legislative history of the Acts shows positively that the threat to the bald eagle lay elsewhere and that there is no threat to the golden eagle.

CONCLUSION

The decision of the court of appeals should be affirmed and expanded to protect the religious use of eagles by Indians on their reservation whether the Reservations are established by treaty, statute or executive order.

Respectfully submitted,

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BRIEF

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THE UNITED STATES SUPREME COURT

UNITED STATES,
Petitioner,

vs.

DWIGHT DION, Sr.,
Respondent.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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AMICUS CURIAE BRIEF OF THE HOPI INDIAN TRIBE IN SUPPORT OF THE RESPONDENT

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Interest of the Amicus Curiae

Live golden eagles are gathered by Hopi Indians for religious purposes. According to Hopi religious belief, the God-given duty to gather golden eagles cannot be squared with making applications to secular authorities who can approve or deny their freedom to practice their religion. The First Amendment's Free Exercise Clause requires an accomodation of bona fide Hopi religious beliefs and practices. The Bald and Golden Eagle Protection Act should be construed so that there is no necessary constitutional conflict between constitutionally protected Indian religious rights and implementation of the Bald and Golden Eagle Protection Act.

Summary of Argument

1. The focal point of Hopi religious worship is the golden eagle. Traditional Hopi religion is the core o. Hopi society and culture. Rights to gather and use golden eagles, according to Hopi religion, were granted to the Hopi people by the Creator from time immemorial. As a result, many Hopi believe it is contrary to their religion to request civil authorities to grant or deny them permission to gather eagles.

2. Statutes should be construed to avoid conflict with the First Amendment's Free Exercise Clause. Accomodtion of Hopi religious beliefs and practices is both possible and warranted under First Amendment and American Indian Freedom of Religion Act.

3. Hopi religious gathering and use of golden eagles does not endanger or threaten survival of the species.

4. Serious Constitutional problems would arise if the Bald and Golden Eagle Protection Act, as construed, does not accomodate Hopi religious beliefs and practices which prohibit seeking permits from civil authorities.

Consent of the Parties

The Hopi Tribe has received the consent of the parties to the filing of this brief. Copies of those consents have been sent to the Clerk of the Court under seperate cover.

Argument

I. The Central Role Of Golden Eagles In Hopi Traditional Religion

The Hopi Indians of northeastern Arizona are one of the most religious

and traditional of Indian Tribes in the United States. With the golden eagle as the focal point of religious worship, Hopi Indian Tribe v. Unites States, 23 Ind. Cl. Comm. 277,279 (1970), vacated on other grounds, ceremonial religion dominates every aspect of Hopi life. "Society, government, economics, arts and crafts are integrally associated with religion, and is the inevitable moving force." Simpson, The Hopi Indians, Vol. XXV, The Masterkey 109, 120 (1951) (Southwestern Museum of Los Angeles). Entire familes, from grandparents through grandchildren; clans, relationships based on matri-lineal descent; and villages participate in Hopi religious ceremonies. The annual cycle of ceremonies, with its "kaleidoscopic" ritual, E. Parsons, 1 Pueblo Indian Religion at 268 (1939), is so full and elaborated as to cause those

who have studied it first-hand "to exclaim in dispair that it is beyond the compass of one man's lifetime to understand." A. Stephen, Hopi Journal at XLVIII (1936). See also T. Mails, II The Pueblo Children of Mother Earth at 18 (1983) (ceremonies consume anywhere from two-to-sixteen days of each month).

Hopi religion, like Christian and Jewish religion, begins with an account of the genesis of the Hopi into this world. When the Hopi arrived in northern Arizona by way of the Sipapu, or opening from the underworld below, they were met by the God Massaw, who, by some accounts, appeared in the form of an eagle. Massaw gave his permission for the Hopi to occupy this land. The Eagle told them:

> "Any time you want to send a message to our Father Sun, the Creator, you may use my feather. For I am the conqueror of air and master of

> height. I am the only one who has the power of space above, for I represent the loftiness of spirit and can deliver your prayers."
>
> From that time on eagle feathers have been used to carry the people's prayers aloft to the Creator. The simplest paho [prayer feather] is merely a "downy" or down feather of an eagle, to which is attached a string of native cotton....

F. Waters, Book of the Hopi at 132 (1963). As the symbol of Father Sun, the Creator, and with the power to carry aloft prayers to the deities, the golden eagle is the most sacred of all animals. Hopi Tribe v. United States, supra at 279; F. Ellis, The Hopi: Their History and Their Use of Lands in Hopi Indians at 147 (1974).

"In nearly all the principlal [Hopi] ceremonies the eagles are remembered by prayer offerings, prepared for them by their priests." Voth, "Notes on the Eagle Cult of the Hopi," in Brief

Miscellaneous Hopi Papers at 107, Field Museum of History, Anthropological Series, Vol. XI, No. 2, Publication No. 175 (1912). Accord, Parsons, supra at 289; T. Mails, supra at 65. There are several hundred identified Hopi eagle shrines which the Hopi periodically visit where they leave "pahos," for prayer and golden eagle gathering. See Healing v. Jones, 210 F. Supp. 125, 160 n.45 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963); Hopi Tribe v. United States, 23 Ind. Cl. Comm. at 279; W. Keane, Sun in the Sky at 182 (1950).

A "paho" is a prayer feather or prayer stick made up from several materials, the most important of which is the eagle feather. The "paho" "is inseperably connected with all religious ceremonies and prayers. It is a prayer in itself, and makes the spoken prayer associated with it effective". T.

Mails, supra at 144. "Indeed, it can be said that Pueblo ceremonial consists of prayer-stick-making and offering together with prayer and other ritual." Parsons, supra at 270. See also Waters, supra at 133. "[T]he prayer stick calls the attention of the deity. When Cloud or Sun or some other deity sees the prayer stick, he looks for the prayer feather and there reads (tütü' ben lauwû)[1] what is in the Hopi maker's heart." A. Stephen, supra, at 164. Torn or imperfect feathers may not be used. Id. at 801. Feathers taken from live eagles are required for most ceremonial purposes by Hopi, because they have the power of lightness and

[1] "Tütü'ben lauwû" or more accurately "Tütü-vani" means in Hopi the finished product of a message or writing.

purity needed to carry prayers to the deities. E. Parsons, supra at 291.[2]

Special religious importance is attached by the Hopi to the capture of live golden eaglets, whose feathers are later used to make pahos. Golden eaglets are considered representatives of lost or "dead Hopi who have returned to the villages disguised as eagles." F. Ellis, supra, at 152. Upon capture, they are strappled to craddle boards as babies and carried back to the Hopi villages. The heads of the young eagles are then washed with sacred corn meal,

[2] For Example, a downy feather from a live eagle is placed over the face of a dead Hopi to render him light, as the eagle, that he may travel quickly on his journey home. E. Parsons, 1 Pueblo Indian Religion at 283, 286, 290-291 (1939). The other prayers for which a paho is used are to numerous to detail. Suffice it to say, whatever a Hopi wishes to pray for, a paho is used for this purpose.

given Hopi clan names, and cared for as adopted members of Hopi families. This ceremony is similar to the baby-naming ceremony for Hopi children. See Page, "Inside the Sacred Hopi Homeland," 162 National Geographic 626-629 (1982). "There is a link between the bird and clan. 'Since the birds come from clan owned buttes, they are considered as children of the clan.' As fellow clan members they tighten the bond between living members of the clan and the Six-point Cloud people to whom they are sent home." H. Tyler, Pueblo Birds and Myths at 58 (1979) (footnote omitted). After a time, the spirits of these eagles are sent home to report to the other eagles on how the Hopi are conducting themselves and so that more eagles may be come to the Hopi in the following year. After they are sacrificed and their feathers are

removed, the bodies of the eagles are buried in the same manner as Hopi children. E. Beaglehole, Hopi Hunting and Hopi Ritual, Yale University Publications in Anthropology, No. 4 at 21-22 (1936).

The use of feathers from live golden eagles is central and indispensable to Hopi worship. Without feathers co-lected in the proper manner, Hopi reli-gion cannot be practiced. This right, then, is fundamental to the exercise of Hopi religion, which is at the core of Hopi society and culture. Interference with the exercise of Hopi religion in the ceremonial gathering and use of golden eagles would be destruc- tive of Hopi religion, society and culture.

A dramatic manifestation of the centrality of eagle gathering to Hopi religion is found in the Constitution and By-Laws of the Hopi Tribe which were

approved by the United States in 1936 under the Indian Reorganization Act, 25 U.S.C. §476. Article IV of the By-Laws entitled "Eagle Hunting Territories and Shrines" provides:

> The Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories, and to secure adequate protection for its outlying established shrines.

Harold Ickes, Secretary of Interior, approved the Hopi Constitution and By-Laws for the United States, with the following order:

> All rules and regulations heretofore promulgated by the

> Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of said constitution and By-Laws are hereby declared inapplicable to these Indians.

By providing for the protection of Hopi religious eagle gathering rights in the very first document of self-government adopted by the Tribe, the Hopi concretely demonstrated the importance of this right to Hopi religion. United States approval of the Constitution and By-Laws of the Hopi Tribe constitutes affirmative acknowledgement by the United States of Hopi religious rights to gather eagles.

According to Hopi religion, permission as well as the obligation to gather live golden eagles was given to the Hopi

by the Creator. A central and integral part of Hopi belief is that civil authorities cannot also be requested to approve, deny or condition Hopi obligation to perform these sacred duties. Thus, the Hopi believe as a conscientious matter that their religion prohibits them from seeking permits authorized under the Bald and Golden Eagle Protection Act [hereinafter BGEPA], 16 U.S.C. §§ 668 et seq., and 50 C.F.R. § 22. To put Hopis to a Hobson's choice of violating their religious beliefs or violating federal criminal law is to create an obvious and substantial burden on the free exercise of Hopi religion. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 717-718 (1981); Wisconson v. Yoder, 406 U.S. 205, 218 (1972).

II. Statute Should Be Construed To Avoid Conflict with Frist Amendment Gaurantee Of Free Exercise Of Relgion.

It is well established that the Free Exercise Clause protects both freedom to believe and freedom to act in accordance with those beliefs. Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940). In order to accomodate these two aspects of the Hopi's right to Free Exercise of Religion, the BGEPA and implementing regulations should be construed to recognize an exemption from the permit requirement for Indians, who, on the basis of bona fide religious belief, cannot conscientiously seek such permits. Such a construction is warranted, because the Constitution "affirmatively mandates accomodation."

Lynch v. Donnelly, 104 S. Ct. 1355, (1984).[3]

Affording the BGEPA such a construction not only avoids a constitutional challenge to the statute, but also accords with the American Indian Freedom of Religion Act, PL 95-341. This latter legislative enactment clearly manifests an intent that Indian "use and possession of sacred objects" should not be interfered with as a result of "insensitive and inflexible enforcement of Federal policies and regulations." In

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[3]"[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided". Crowell v. Benson, 285 U.S. 22, 62 (1932). "A Statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts as to its constitutionality". St. Martin Evangelical Lutheran v. South Dakota, 451 U.S. 722, 780 (1981). "When a federal court is dealing with a federal

the House Report accompanying the American Indian Freedom of Religion Act, Congress noted its confidence that the "Federal court system has shown this apparent conflict can be overcome with the institution of well thought out exceptions. Although acts of Congress prohibit the use of peyote as a hallucinogen, it is established Federal law that peyote is constitutionally protected when used by a bona fide

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(footnote 3 continued):
statute challenged [under the Free Exercise Clause], it should of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction". New York v. Ferber, 458 U.S. 747, 769 n. 24 (1982). This Court has afforded congressional and state enactments a saving constitutional construction even in the absence of explicit statutory language so requiring. Califano v. Yamosaki, 442, U.S. 682, 693 (1979). In the case of prior restraints on the free exercise of religion, a saving construction is especially warranted because a prior restraint come

religion as a sacrament." House Report 95-1308 at 2.[4] Specifically acknowledging the legitimate needs of some Indian religions for eagle feathers, the Congress expressed its expectation that regulations would be modified to accommodate these needs, stating: "Although the enforcement problems create more difficult administrative issues and requires more careful consideration of regulation changes in this area, it is possible to both uphold the intent of the laws and allow for religious freedom." Id. at 3. See, e.g., Wisconson v. Yoder, 406 U.S. 205 (1972) (exception accomodating First Amendment Free Exercise Clause rights can be read into the law without striking down statutory scheme as a whole).[5]

III. Taking Of Golden Eagles For Hopi Religious Purposes Does Not Endanger Or Threaten The Survival Of The Species

There are between 50,000 and 100,000 golden eagles in the 48 contiguous states of the United States. C. Snow, Report No. 7, Golden Eagles, Habitat Management Series for Unique or Endangered Species, Bureau of Land

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(footnote 3 continued):
"to this Court bearing a heavy presumtion against its constitutional valiity." Capital Cities Media, Inc v. Toole, 103 S.Ct. 3424, 3526 (1983).

[4]Hopi Traditional religion does not involve the use of peyote or other hallucinogen drugs.

[5]The necessity for affording the BGEPA a construction to avoid constitutional tension in cases where Indians cannot conscientiously seek permits is underscored by current problems in the administration of permit applications under the Act. In a recent hearing before the United States District Court in New Mexico involving prosecution of an Isleta Pueblo Indian for taking a golden eagle without a permit, a law

Management, Department of Interior, Technical Note (T-N-239), Filing Code

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(footnote 5 continued):
enforcement agent for the U.S. Fish and Wildlife Service testified that his agency has never issued, to his knowledge, a permit to an Indian to take a live golden eagle for religious purposes. Moreover, he testified that, to his knowledge, the agency has no standards or policies by which to grant or deny such permits. Transcript of Testimony of Keith Frederick, at 14-15, on August 9, 1985, United States v. Abeyta, No. CR-85-79. Further, agent Fredrick testified that applicants seeking an entire dead eagle must wait up to two years before receiving the requested animal. Id. at 14. In some cases, he acknowledged, this delay meant that feathers would not be received in time for the ceremony for which they were requested, as in the case of burials of the dead. The government has no program, despite these delays, to harvest eagles to meet Indian religious needs in an expenditious manner; but the government does allow private ranchers to obtain permits to kill eagles as predators as needed. Id. at 51-57.

The unreasonable delay in providing needed eagle feathers and the absence of narrowly drawn, reasonable, and definite agency guidelines limiting the exercise of agency descretion for the issuance of permits for possession of eagle feathers by Indian religious pratitioners raises

6601 (1973). According to a 1982 U.S. Fish and Wildlife statement, "The golden eagle is thus neither rare, threatened or endangered." Statement of Fish and Wildlife Objectives Regarding Golden Eagles, dated June 28, 1982, prepared by James F. Gillet.[6]

IV. Serious Constitutional Issues Would Arise If The Eagle Protection Act As Construed Does Not Accomodate Hopi Religious Beliefs And Practices Regarding Permits

Enactments abridging or seriously burdening freedom of the exercise of

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(footnote 5 continued):
serious prior restraint problems under applicable decisions of this Court. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-151 (1961); Niemotko v. Maryland, 340 U.S. 268, 271-272 (1951); Cantwell v. Connecticut, 310 U.S. 296, 305-307 (1940).

[6]That the taking of golden eagles by Indians for religious purposes does not endanger or threaten survival of the species is confirmed by the uncontradicted testimony of the State biologist

religion must be the least restrictive means of achieving a compelling governmental end. See Bob Jones University v. United States, 103 S. Ct. 2017, 2035 (1983); Larson v. Valente, 456 U.S. 228, 247 (1982); Wisconson v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v.Verner, 374 U.S. 398, 406 (1963). In the context of Hopi golden eagle gathering and use rights, the government would not have to

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(footnote 6 continued):
responsible for monitoring endangered species in New Mexico. He testified as an expert on golden eagles in United States v. Abeyta, that the taking of an eagle by Indians in New Mexico for religious purposes would not pose a problem for the species. Transcript of testimony of John Hubbard at 20-28. This is not a situation, therefore, in which religious rights conflict with efforts to preserve a species.

Hopi Indian have been taking golden eagles from the same designated clan eagle gathering areas for hundreds of years. Hopi gathering practices do not and will not endanger the golden eagle species.

justify the BGEPA as a whole by the standard of the least restrictive alternative for achieving a compelling governmental end; rather, if Hopi were required by the Act to obtain permits, the government would have to justify that requirement as the least restrictive mean of achieving a compelling governmental end as to why Hopis cannot be afforded an exemption from the permit requirement. Wisconson v. Yoder, 406 U.S. at 220-221. Affording Hopis an exemption from the permit requirement in order to accomodate fundamental Hopi religious beliefs does not render the statutory scheme as a whole unworkable, nor does it put at risk a threatened or endangered species. Sherbert v. Verner, 374 U.S. at 408-409; People v. Woody, 394 P.2d 813, 820 (Cal 1964).

From the numerous writings about Hopi eagle gathering practices and

beliefs cited earlier, it is obvious that Hopi religious beliefs and practices are not recently discovered, subjective, or mere personal preferences. The historical record demonstrates that the Hopi are deeply religious people, whose eagle gathering religious beliefs and practices are intimately related to daily life in a society which has successfully survived in a harsh environment over hundreds of years. Enforcement of the permit requirement of the BGEPA against sincerely held Hopi religious scruples would gravely endanger, if not destroy, the free exercise of Hopi religion, and in the end Hopi society and culture as well. But see Wisconson v. Yoder, 406 U.S. at 216, 222; Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

Conclusion

As amicus curiae, the Hopi Tribe urges that the Court afford the Bald and Golden Eagle Protection Act an interpretation which will accomodate the needs of Hopi religion.

Respectfully submitted.

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